

No. 20770

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

8429

V. 3429

UNITED SHOPPERS EXCLUSIVE, a )  
California corporation; )  
MANFREE, INC., a California )  
corporation, )  
Appellants, )  
vs. )  
GENERAL ELECTRIC COMPANY, a )  
New York Corporation, et al., )  
Appellees. )

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Appeal from the United States District Court for  
the Northern District of California  
OPENING BRIEF OF APPELLANTS

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GENERAL ELECTRIC COMPANY, a	)	
New York corporation, et al.,	)	
	)	
Appellees.	)	
	)	

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APPELLANTS' OPENING BRIEF

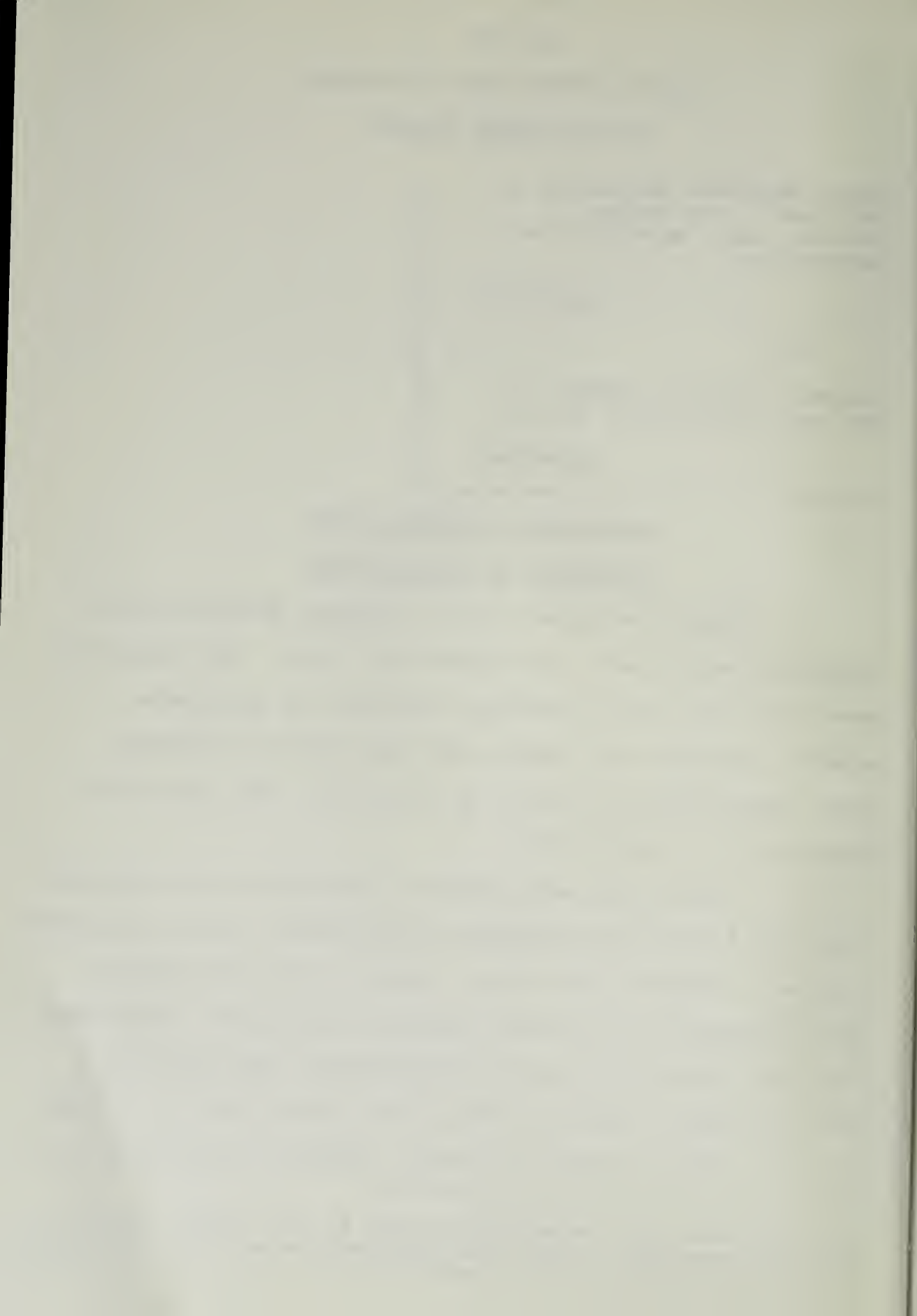
STATEMENT OF JURISDICTION

This is an appeal from a judgment dismissing two complaints which were consolidated for trial. The complaints were filed and the proceedings instituted by appellants against appellees and others under the Federal Antitrust laws, specifically 15 U.S.C. §§ 15 and 16. The complaints appear at R. 1 and R. 15.<sup>1/</sup>

The actions were tried in the United States District Court for the Northern District of California, before Honorable Alfonso J. Zirpoli and a jury. Prior to trial the actions were dismissed as to certain original defendants. Thereafter they were referred to as "co-conspirators" (see Pre-trial Order of July 8, 1965, R. 1431, 1476) and will be so referred to here. After a trial of 38 days, judgment was entered for all

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<sup>1/</sup> Appellants will hereinafter refer to the Clerk's Record as "R." and the transcript of the trial proceedings as "Tr." Transcripts of pre-trial hearings will hereinafter be referred to as "P.Tr."



appellees by the District Court, on motions by each appellee, and an order was entered dismissing the complaints (R. 1977).

Appellants thereafter appealed (R. 2048). After this appeal was docketed, this Court upon appellants' motion, dismissed appellee Broadway-Hale Stores, Inc. (hereinafter co-conspirator Hale) as an appellee in this case, by its order filed on April 4, 1967.

This Court has jurisdiction to review the judgment under 28 U.S.C. §§ 1291 and 1294(1).

#### STATEMENT OF THE CASE

##### A.

##### Nature of the Case

Appellants allege that the appellees and co-conspirators violated Sections 1 and 2 of the Sherman Act, (15 U.S.C., §§ 1 and 2).<sup>2/</sup> Appellant United Shoppers Exclusive (U.S.E.) was and is a retail discount department store, which, at the times involved, operated a store at 2850 Alemany Boulevard, San Francisco, California. Appellant Manfree, Inc. (Manfree) was and is a lessee of U.S.E., operating the major appliance and television concession at U.S.E.'s store. At all times involved, Manfree sought to sell major appliances and television sets at retail. The discount store operation is now well recognized in the United States retail industry, characterized by minimum overhead and correspondingly reduced retail prices over a broad range of consumer products.

Appellants seek treble damages under Section 4 of the

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<sup>2/</sup> Sections 1 and 2 of the Sherman Act are set forth in Appendix D.



3/  
Clayton Act (15 U.S.C. § 15), and injunctive relief under Section 16 of the Clayton Act (15 U.S.C. § 26). Basically, they have alleged that they were the subject of a group boycott, organized in response to the anticipated competitive impact of their price-cutting sales policy upon the San Francisco retail market for the particular products involved. As a result of that boycott, Manfree was unable to obtain most of the leading brands of the subject products from the vendor appellees and their co-conspirators. This condition existed at the time of the filing of the first complaint, August 12, 1960 (R. 1), and Manfree remained unable to obtain such products from such companies at the filing of the second action four years later, on August 4, 1964 (R. 15). U.S.E. was unable to advertise at all, during the period of 1957 to 1960 in the morning newspapers in San Francisco: the San Francisco Examiner, and the San Francisco Chronicle. Of course, appellants were never able to advertise the brands of products involved denied to Manfree. U.S.E. was also injured by reason of lost rentals under its percentage lease with Manfree, as the latter was virtually without the leading brands of major appliances and television sets for approximately seven (7) years, as a direct result of the illegal boycott imposed against it.

B.

#### The Complaints

The complaints charged that the appellees and co-conspirators unreasonably restrained interstate trade and commerce, and conspired to monopolize such trade and commerce in San

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3/ Section 4 of the Clayton Act is set forth in Appendix D.







Francisco, California, in that:

a. The defendants operating retail stores agreed to fix retail prices on major appliances and television sets in San Francisco, California, and each defendant manufacturer and its distributor for the San Francisco market area refused to supply such products to Manfree, in order to support such price-fixing scheme.

b. Vendor defendants refused to sell the subject products to retail stores in San Francisco who would not abide by the price-fixing agreement.

c. Vendor defendants agreed to refuse to sell the subject products to retailers in San Francisco operating as "discount stores".

d. Vendor defendants favored and protected the retail stores operated by members of the conspiracy, by offering and allowing them special price and advertising terms and advantages not offered to competitive stores.

e. The retail store-operating defendants agreed to bring the pressure of their combined advertising-purchasing business to bear upon the major newspaper publishers in San Francisco, California, in order to prevent appellants from being allowed to advertise in these newspapers.

f. Defendants and co-conspirators agreed, and acted pursuant to such agreement, to eliminate Manfree from active competition in the sale of the subject products, and sought to prevent the successful operation of all departments of U.S.E.

g. Retail store-operating defendants entered into various non-competitive arrangements with each other, and sought



to allocate among themselves the business of retailing major household appliances and television sets in San Francisco. The vendor defendants agreed to boycott appellants in the distribution and sale of such products, and in implementation thereof, uniformly refused to sell these products to Manfree.

The complaints specifically alleged that co-conspirator Hale enjoyed monopolistic buying power in the State of California, and used that buying power to deny to appellants the competitive position they could have otherwise obtained in the purchase and sale of the products manufactured and distributed by the vendor defendants in a free and open market, by threatening to discontinue its sales of such products obtained from these vendors, unless such companies refused to sell their products to Manfree (R. 1, 8-12; 15, 20-24).

The complaint filed in August, 1960, (No. 39,336 below), specified that from May, 1957, to the date of the filing, appellants experienced continuing difficulty in obtaining major appliances and television sets; and that as of August, 1960, Manfree was unable to obtain any of the major products sold and distributed by the vendor appellees and co-conspirators, although it had repeatedly requested such products, and had been fully able, ready, and willing to order large shipments of such merchandise.

Manfree prayed for damages arising from its loss of profits, goodwill, reputation and prestige amounting to the sum of \$500,000.00.

U.S.E. prayed for damages in the amount of \$200,000.00 arising from its loss of profits, goodwill, reputation and



prestige.

The complaint filed on August 4, 1964 (No. 42,674 below), contained substantially the same allegations as the previous complaint. It did not name Sylvania Electric Products, Inc., Westinghouse Electric Supply Co., or Frank H. Edwards Co. as defendants, and added Callectron, Norge Sales Corporation, and Zenith Sales Corporation as defendants.

The 1964 complaint asked for additional damages in the sum of \$600,000.00 for Manfree, and \$200,000.00 for United Shoppers Exclusive, as a result of the continuation of the illegal boycott. Plaintiffs continued their demand for injunctive relief.

C.

Parties

1. Plaintiffs:

U.S.E. opened for business in March, 1957, as a membership discount department store. A membership card with a fee of \$2.00 was required of a prospective customer to gain admission. This policy was abandoned in September, 1961, and thereafter cards were no longer required for admission. When the store opened, membership cards were available to the public for an introductory three-week period (Tr. 5707-5708; 6052; 6196-6201; see Pl. Ex. No. 4038).<sup>4/</sup> After this period and until about January, 1960, membership cards were allowed to members of any general group such as labor unions, veterans, and government employees (Tr. 5707-5708; 6201-6202). Cards

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<sup>4/</sup> Plaintiffs' Exhibits will be referred to as "Pl. Ex. No."





were also available to the family and friends of any member (Tr. 6199; 6204-6205). About January, 1960, membership cards were made available to the public (Tr. 6203-6204).

The U.S.E. store premises contain approximately 30,000 square feet of floor space, and had most of the departments customary to large department stores. It leased the major appliance, television, and hi-fidelity phonograph concession to Manfree on the basis of a fixed flat rental fee, plus a percentage of the gross receipts on the sale of such items. (Tr. 5710-5711; 6018-6019; 6027; Pl. Ex. No. 5017).

2. Defendants:

The present appellees before this Court are:

(1) California Electric Supply Company (California Electric) was at all times concerned a distributor of Philco major appliances and television sets (Pl. Ex. Nos. 55 and 59; Tr. 3621-3631; 3664-3667). Hale also served as an "associate" distributor of Philco major appliances and television sets in the San Francisco market area. (Pl. Ex. Nos. 295, 296, 297, 298 and 299). California Electric claims that it ceased to distribute Philco major appliances to retailers as of January, 1963, while continuing distribution of such products to builders. (Tr. 3665-3666; 3765).

(2) Frigidaire Sales Corporation (Frigidaire) distributes major appliances manufactured by the Frigidaire Division, General Motors Corporation. (Tr. 4205-4208; Pl. Ex. No. 36; Tr. 4292-4295).

(3) General Motors Corporation is a defendant herein through its Frigidaire Division (Frigidaire). (Pl. Ex. Nos. 35





and 36).

(4) General Electric Company (G.E.) distributes major appliances and television sets. Such G.E. products are distributed in Northern California through the Northern California District of the General Electric Major Appliance Division, headquartered in Burlingame, California. G.E. major appliances and television sets are manufactured by the General Electric Major Appliance Division in Louisville, Kentucky. G.E. at all times involved also manufactured such products through its Hotpoint Division, under the "Hotpoint" brand name. (Tr. 4129-4131; 4390-4391; 4425; Pl. Ex. No. 547A).

(5) Hotpoint Division of General Electric Company (Hotpoint) was sued separately as a defendant. During at least the period 1957 through 1959, Hotpoint also manufactured television sets. It distributed major appliances and television sets in Northern California through co-conspirator Graybar Electric Co. (Graybar). (Pl. Ex. Nos. 31, 32, 33 and 34).

(6) Maytag West Coast Co. (Maytag West Coast) distributed major appliances, principally home laundry equipment, washers and dryers, manufactured by appellee The Maytag Company (Maytag). (Pl. Ex. No. 134). Maytag West Coast is wholly owned by Maytag (Tr. 3307)

(7) Maytag has total operating control of Maytag West Coast. (Tr. 3479-3482).

(8) Borg-Warner Corporation (Borg-Warner) is the manufacturer of Norge brand household appliances. Norge appliances are distributed in Northern California by co-conspirator W. J. Lancaster Co. (Lancaster) (Pl. Ex. Nos. 46, 47 and 48).

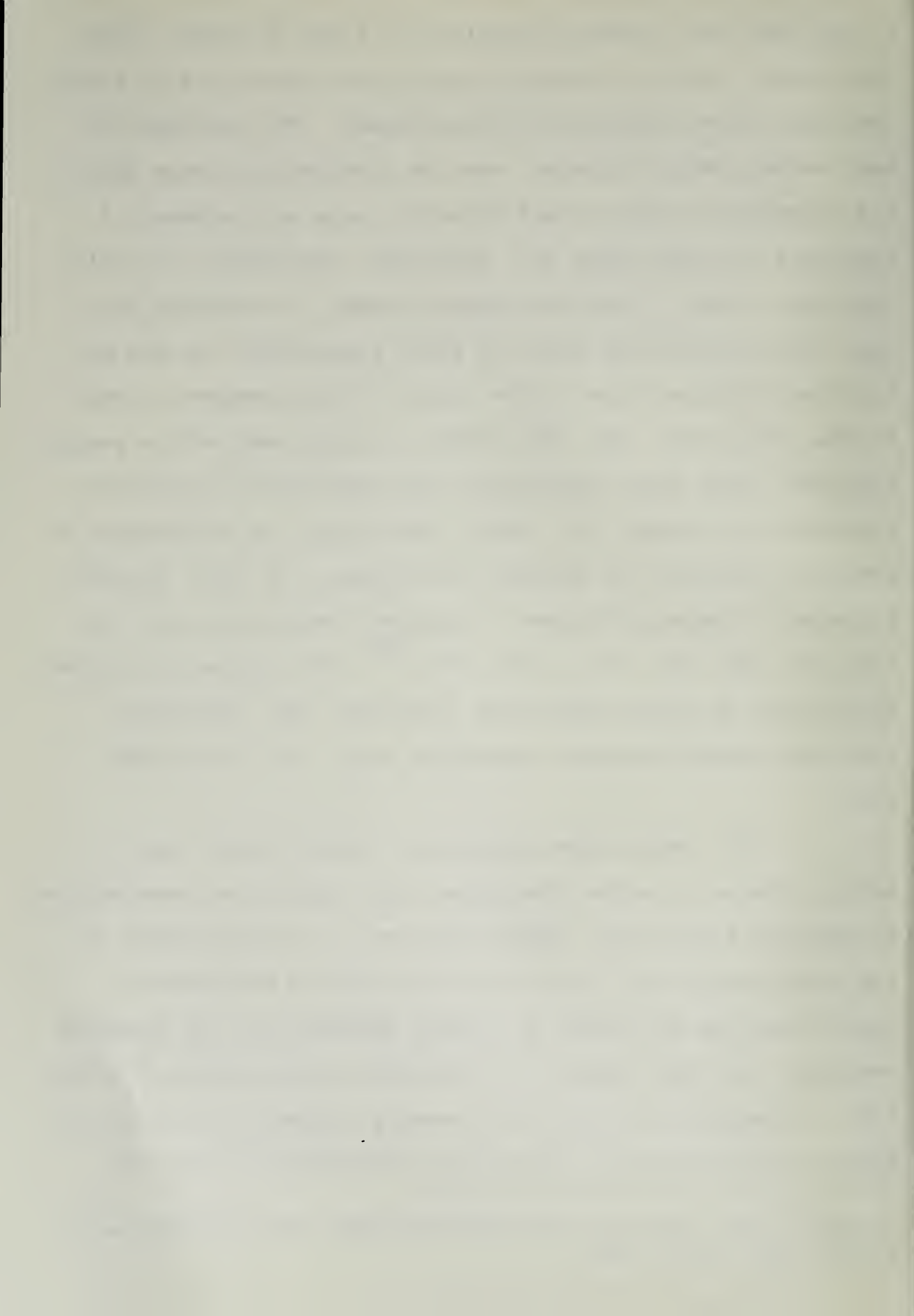


At the time the original complaint was filed in August, 1960, Borg-Warner owned and totally directed the operations of appellee Norge Sales Corporation (Norge Sales). The president of Borg-Warner, Norge Division, was the president of Norge Sales, and Borg-Warner officers and directors were on the Board of Directors of Norge Sales (Tr. 2484-2504; 2511-2515; 2517-2519; 5366-5369; 5384). The Court below assumed, in deciding this case, that Borg-Warner would be fully responsible for the activities of Norge Sales in the context of the matters alleged in the complaints. (R. 1912, 1962). During most of the period involved, Norge major appliances were distributed in Southern California by Graybar (Tr. 2389; 5369-5373), the distributor of Hotpoint appliances in Northern California. By 1963, the distributor of Norge appliances in Southern California was J. N. Cezan Co. (Pl. Ex. for Id. No. 1774).<sup>5/</sup> The Northern California distributor of Norge appliances, Lancaster (Tr. 2357-2358), also distributed Motorola television sets. (Tr. 2357-2358, 2393).

(9) Norge Sales Corporation (Norge Sales) was an entity created to market the Norge-brand appliances manufactured by appellee Borg-Warner (Norge Division). As noted above, it was effectively fully owned and controlled by Borg-Warner. Norge Sales was not named as a party defendant in the original complaint, but was joined as a defendant in the action filed in 1964. Pursuant to a motion for summary judgment by Norge Sales based on the statute of limitations provisions of 15 U.S.C.

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<sup>5/</sup> Plaintiffs' Exhibits for Identification will be referred to as "Pl. Ex. for Id. No."



§ 15(b), the District Court filed its order on June 4, 1965, dismissing Norge Sales as a defendant (R. 165-166). The Court expressly did not direct and determine that its order was a final judgment pursuant to F.R.C.P. Rule 54(b). (See Pre-trial Hearing, July 6, 1965, P. Tr. 64).

(10) Radio Corporation of America (R.C.A.) was involved herein through its manufacture and sale of television sets. Prior to 1957 and thereafter until May 31, 1964, R.C.A. television sets were distributed in Northern California by co-conspirators Leo J. Meyberg Co., and later as A. H. Meyer Co., its successor company, and after May 31, 1964, by Callectron, Inc., which had acquired A. H. Meyer Co. (Pl. Ex. Nos. 88, 90 and 91). R.C.A. also distributes television sets in various areas of the United States, including Southern California, through RCA Victor Distributing Corporation (Pl. Ex. for Id. No. 1702; and see Tr. 4672-4673, 4685).

(11) Whirlpool Corporation (Whirlpool) manufactures major appliances. During the time concerned Whirlpool distributed its major appliances in the same way as R.C.A., i.e., through co-conspirators Leo J. Meyberg Co. or A. H. Meyer Co., and Callectron, Inc. <sup>6/</sup> (Pl. Ex. No. 5081). Appellants offered to prove that R.C.A. had two of its officers serving on the Board of Directors of Whirlpool (Pl. Ex. for Id. No. 5086).

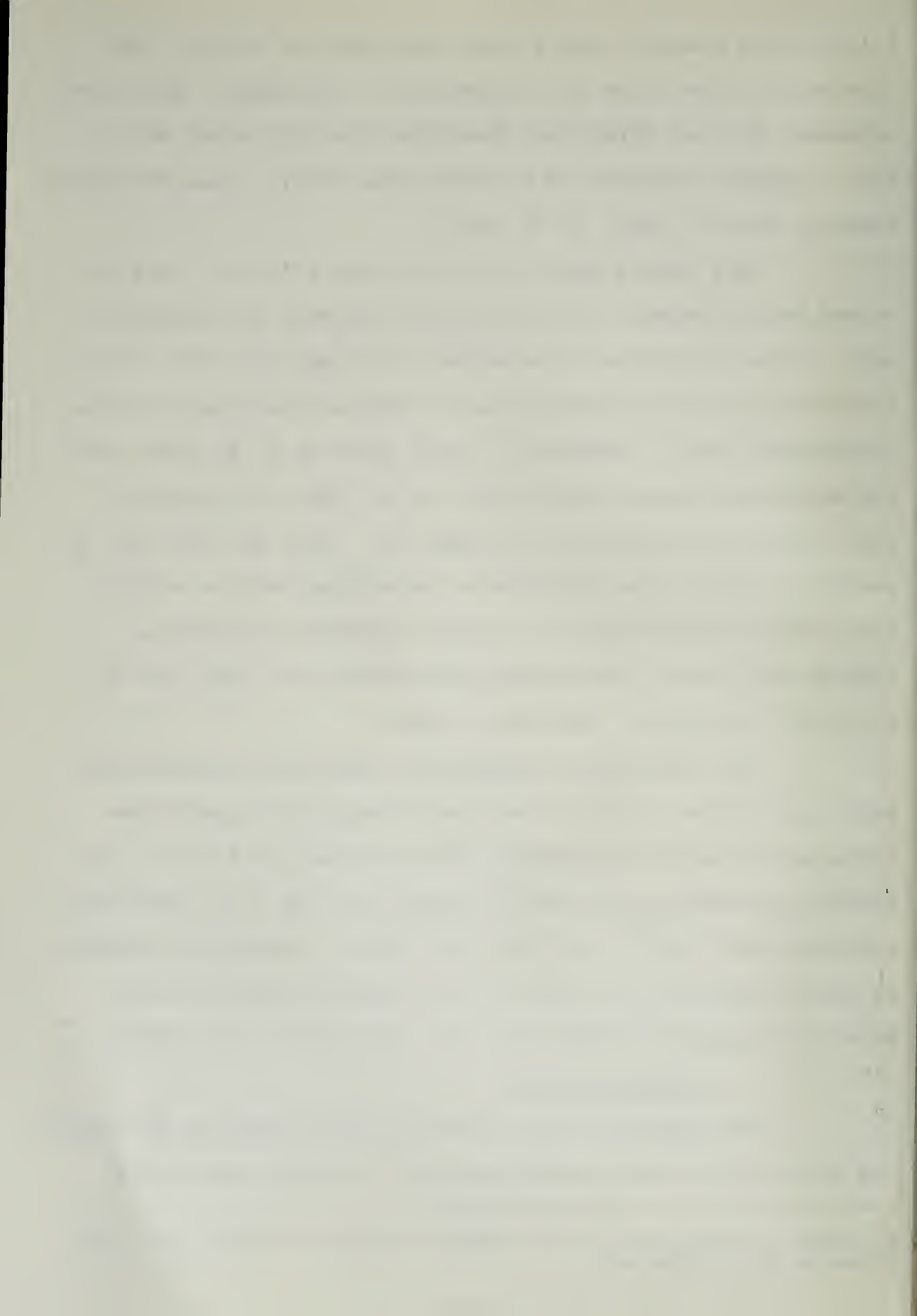
### 3. Co-Conspirators:

The complaints as originally filed named as defendants the distributors and manufacturers of the above-named major

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<sup>6/</sup> These co-conspirators (in effect the same company) will be referred to as "Meyer".





appliances and television sets, and four other leading manufacturers of such products:

a. Zenith products: Zenith Radio Corporation (Zenith), manufacturer, and H. R. Basford Co. (Basford), distributor.

b. Motorola products: Motorola Corporation (Motorola), manufacturer, and W. J. Lancaster Co., distributor.

c. Sylvania products: Sylvania Electric Products, Inc. (Sylvania), manufacturer, and Frank L. Edwards Co., distributor.

d. Westinghouse products: Westinghouse Electric Corporation, manufacturer, and Westinghouse Electric Supply Co., distributor (Westinghouse).

Appellants also named as defendants certain major furniture or department stores retailing major appliances and television sets in San Francisco: R. H. Macy Co. (Macy's), Lachman Bros., Redlick-Newman Co. (Redlick), Sterling Furniture Co. (Sterling) and former appellee, Broadway-Hale Stores, Inc. (Hale).

At the times involved Hale was a department store operator and retailer of major appliances and television sets. It operated 13 retail stores in Northern and Southern California (R. 146). At the time U.S.E. opened, and until January, 1963, the Hale Division of Broadway Stores operated five appliance stores in Northern California; three in San Francisco, one in Sacramento, and one in San Jose. All the appliance stores except the one in Sacramento were closed on January 31, 1963 (R. 157). These stores sold approximately \$4,000,000.00 in appliances and television sets annually (Tr. 441). Hale also





owned Dohrmann Commercial Company which leased the major appliance concessions at the various "Emporium" stores in San Francisco and elsewhere (Tr. 301; Pl. Ex. No. 4269, Answer No. 15). Hale also has owned approximately 24-1/2 percent of the stock of Emporium-Capwell Company, operator of the Emporium stores and Capwell stores in Northern California (Tr. 310).

Appellants named the morning newspapers published in San Francisco, the San Francisco Examiner and the San Francisco Chronicle as co-conspirators; and also named certain trade associations in which the above-named defendants and co-conspirators were members as co-conspirators. (R. 1435, Tr. 2198-2199).

D.

#### Pre-trial Proceedings

##### 1. Pre-trial Order

###### a. Order Requiring a Separate Verdict on

###### The Issue of Liability:

The Pre-trial Order filed August 13, 1965 provided that the issue of liability must be determined by way of special verdict before the issue of damages would be tried before the same jury. (R. 1608-1609). The appellees had contended in their pre-trial statement that there should be separate trials, before the same jury, on the issues of liability and damages (R. 1103, 1123). This was opposed by appellants, (Pre-trial Hearings of May 27, 1965, P.Tr. 4-12, 5-21, 23-25; and July 6, 1965, P.Tr. 127-132), and they filed a memorandum opposing appellees' suggestion that there be a special verdict on the



liability issue (R. 1311). The appellees submitted their memorandum in support of such a ruling (R. 1334), and on July 6, 1965, the Court ordered a separate trial on the issue of liability (P.Tr. 50).

Thus, the trial below did not involve any evidence relating to damages. The Pre-trial Order went so far as to exclude exhibits showing loss of sales and profits to appellants, which they contended were relevant, on the issue of liability. (Pl. Ex. for Id. No. 1500-1); Tr. 6363-6364).

b. Order Limiting Triable Issues to Single Conspiracy to Boycott Appellants, and Conspiracy to Monopolize by Boycott:

Appellants' complaints clearly and specifically allege that the co-conspirator Hale had utilized its substantial buying power to obtain competitive advantages in the relevant market, and to deny to appellants their rightful competitive position in the purchase and sale of products distributed by each vendor appellee and conspirator. (R. 1, Paragraph 10; R. 15, Paragraph 10).

Appellees in their pre-trial statements stated that the issues framed by the pleadings involved only a conspiracy in restraint of trade (R. 1103, 1106, 1112, 1118-1119). The Court requested appellants to make an offer of proof as to the existence of a vertical conspiracy entered into by and between Hale, the retailer defendant, and each manufacturer and distributor defendant or co-conspirator; for example, by Hale (retailer), California Electric (distributor), and Philco (manufacturer). Accordingly, appellants filed their Offer of Proof (R. 1481).



Appellees filed a memorandum in opposition. (R. 1576).

The Court entered a separate Pre-Trial Order on August 13, 1965, limiting the issues to be tried to solely a horizontal conspiracy in restraint of trade and a horizontal conspiracy to monopolize interstate trade and commerce. (R. 1608-1609).

Thus, the Court's determination that the complaints failed to put in issue the liability of the appellees and co-conspirators to the appellants except on restricted grounds stated in the Order, specifically excluded any consideration of an existence of separate vertical price-fixing conspiracies, as follows:

Philco Products: Hale and appellee California Electric, and co-conspirator Philco.

General Electric products: Hale and appellee General Electric.

Hotpoint products: Hale, appellees General Electric, Hotpoint, and co-conspirator Graybar Electric Co.

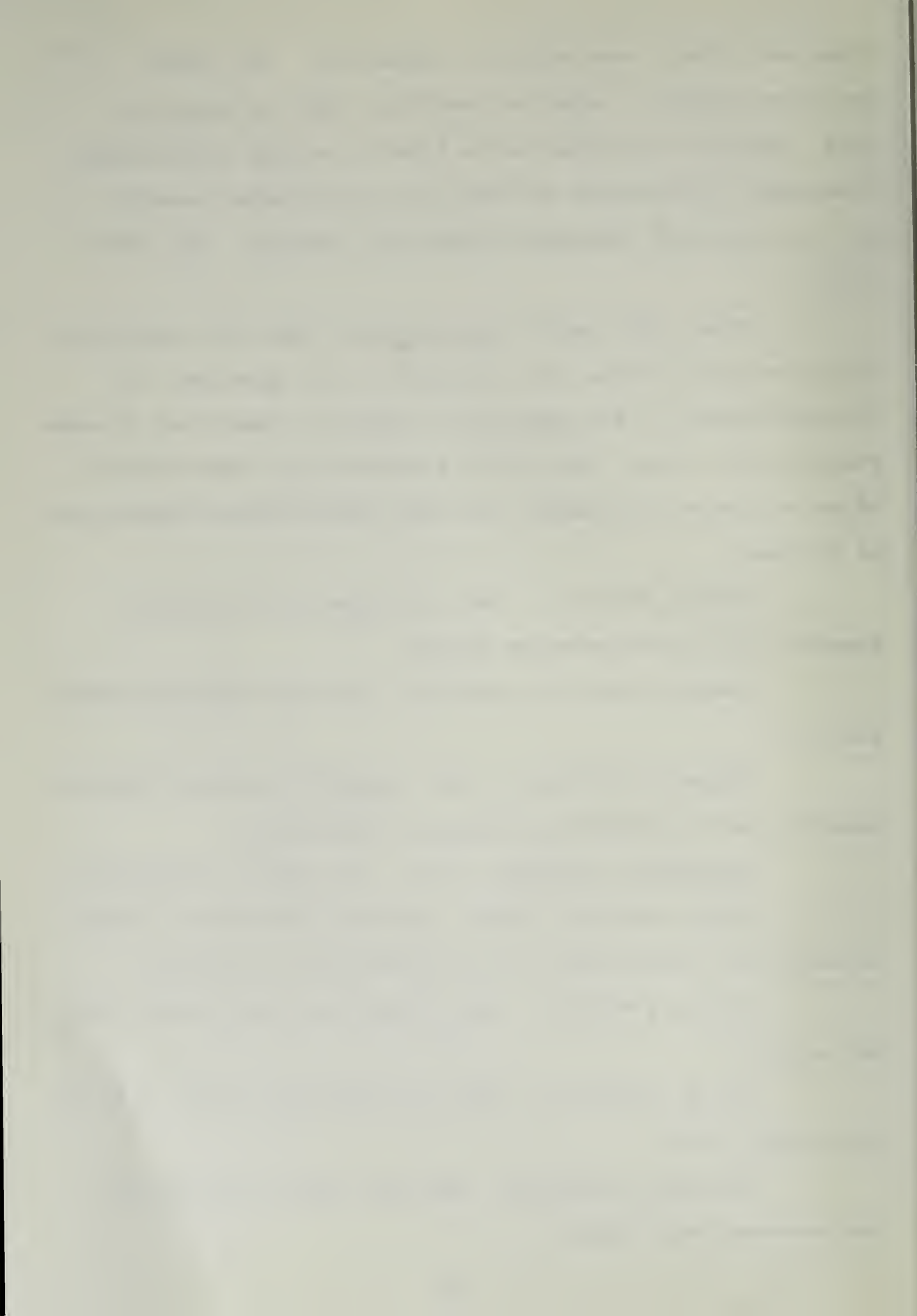
Frigidaire products: Hale, and appellee Frigidaire.

Norge products: Hale, appellees Borg-Warner (Norge Division) and Norge Sales, and co-conspirator Lancaster.

Maytag products: Hale, appellees Maytag West Coast, and Maytag.

R.C.A. products: Hale, and appellee R.C.A., and co-conspirator Meyer.

Whirlpool products: Hale and appellee Whirlpool, and co-conspirator Meyer.





c. Separate Judgment Regarding Norge

Sales Corporation:

The first complaint did not name Norge Sales as a defendant but the second complaint did. (R. 1, 15). On May 17, 1965, Borg-Warner and Norge Sales each filed motions for summary judgment (R. 1079). Appellants opposed these motions (R. 1241). Argument on the motions was held on May 29, 1965, and the Court ordered summary judgment in favor of Norge Sales, on the ground that the applicable Statute of Limitations (15 U.S.C. § 15(b)) had run as to any claim under the antitrust laws against that company. The decision was based on the grounds that Norge Sales had not been sued within four years from the alleged beginning of the conspiracy to which they were a claimed party. (R. 165-166). Appellants moved for a reconsideration of the Order, on June 7, 1965. The Court denied the motion, and entered summary judgment in favor of Norge Sales on June 14, 1965 (R. 165).

2. Discovery Orders

Despite repeated efforts, appellants were unable to obtain all memoranda, reports or notes pertaining to meetings among two or more defendants concerning or relating to appellants, because of unduly limiting pre-trial discovery orders:

a. As to appellee R.C.A.: The Court refused to enforce a subpoena duces tecum requiring Mr. D. Gentile, R.C.A.'s field sales representative in Northern California, to produce certain documents upon his deposition (R. 327a-332). Appellants filed a Motion for an Order to Show Cause as to why the documents identified in the subpoena should not be produced



## CHAPTER IV

THEORY OF THE EARTH AND ITS HISTORY

The earth is a sphere, and its surface is covered by water. The land is divided into continents and islands. The continents are the large masses of land, and the islands are the small pieces of land. The earth is divided into seven parts, called the seven continents. They are Asia, Europe, Africa, America, Australia, Antarctica, and the Arctic region. The earth is also divided into five parts, called the five oceans. They are the Atlantic Ocean, the Indian Ocean, the Pacific Ocean, the Arctic Ocean, and the Southern Ocean. The earth is also divided into many smaller parts, called the countries and the states. The earth is also divided into many smaller parts, called the cities and the towns. The earth is also divided into many smaller parts, called the villages and the hamlets. The earth is also divided into many smaller parts, called the houses and the cottages. The earth is also divided into many smaller parts, called the farms and the fields. The earth is also divided into many smaller parts, called the mountains and the hills. The earth is also divided into many smaller parts, called the rivers and the streams. The earth is also divided into many smaller parts, called the lakes and the ponds. The earth is also divided into many smaller parts, called the forests and the woods. The earth is also divided into many smaller parts, called the meadows and the pastures. The earth is also divided into many smaller parts, called the deserts and the plains. The earth is also divided into many smaller parts, called the mountains and the hills. The earth is also divided into many smaller parts, called the rivers and the streams. The earth is also divided into many smaller parts, called the lakes and the ponds. The earth is also divided into many smaller parts, called the forests and the woods. The earth is also divided into many smaller parts, called the meadows and the pastures. The earth is also divided into many smaller parts, called the deserts and the plains.

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(R. 323-352), pointing out that the subpoena was duly served upon Mr. Gentile, yet no such documents were produced at his deposition, or at the depositions taken by appellees of other officers of R.C.A., Mr. Harold Maag and Mr. Fred Folsom, (upon whom similar subpoenas duces tecum were served.)

R.C.A. asserted that Mr. Gentile was an "employee" only, and could not be served with an effective subpoena requiring appellee to produce documents. (R. 372). The Court denied appellants' motion, and entered an order treating the subpoenas as a motion to produce documents under F.R.C.P. Rule 34; denying the production of any correspondence between R.C.A. and its distributor, co-conspirator Meyer, pertaining to appellants, which had been specifically requested in Item No. 5 (R. 328-330) of the subpoena. R. 413, 414.

Appellants thereafter filed a motion for the production of documents, pursuant to F.R.C.P. Rule 34, addressed to all the factory defendants (R. 422). Item 15 requested production of all intraoffice reports, memoranda or notes pertaining to or relating to appellants, or the retail defendants, during the period of January, 1957 to January, 1963 (R. 422, 425). The Court denied the motion as it concerned the production of these documents (Pre-trial hearing, August 7, 1964; P.Tr. 88-90).

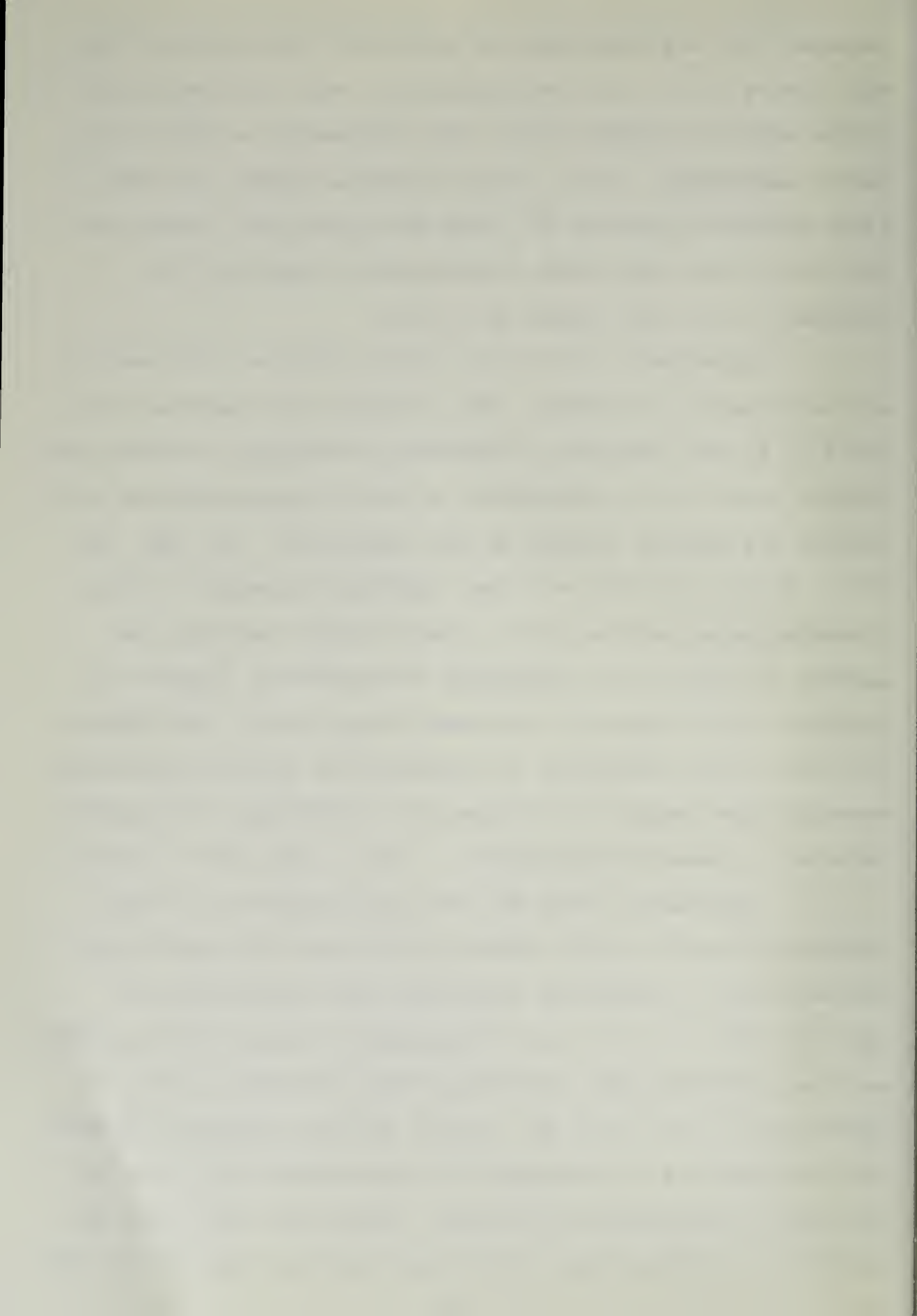
Plaintiffs further filed written interrogatories, pursuant to F.R.C.P. Rule 33, addressed to all the defendants (R. 625), which sought to determine whether or not any written statements or reports existed, reflecting any conversations between an employee, officer, agent, or representative of any

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defendant (or any subsidiary or affiliate) and any other person, having to do with the acquisition, sale, or advertising of the subject products by (i) the appellants, or (ii) by the retail defendants. R.C.A. filed a partial answer (R. 646); after hearing on October 16, 1964 upon appellees' objections, the Court ruled that these interrogatories need not be answered (P.Tr. 6-10; Order at R..671).

Appellants filed their interrogatories addressed to all defendants in December, 1964, seeking more specific statements as to the existence of documents reflecting conversations between agents of the defendants or their representatives concerning the matters covered by the complaints. (R. 790, 791-792). R.C.A. (R. 820) and other appellees objected to these interrogatories and the Court entered orders limiting the answers to facts of the existence of statements, reports or memoranda which expressly referred to appellants, and denying discovery of the existence of statements or reports concerning conversations between an attorney for a defendant, and another defendant, concerning appellants. (See R. 971, as to R.C.A.).

Appellants moved for the production of all correspondence received by the factory defendants from appellants, and any notes or memoranda concerning such communications (R. 745, 749, No. 20); for correspondence between these parties and their distributors, concerning their refusals to sell to appellants (R. 745, 750, No. 22(c)); for any documents concerning conversations or statements by representatives of any of the retail defendants as to prices, competition and other retailers in San Francisco, or the San Francisco Bay Area (R. 745,



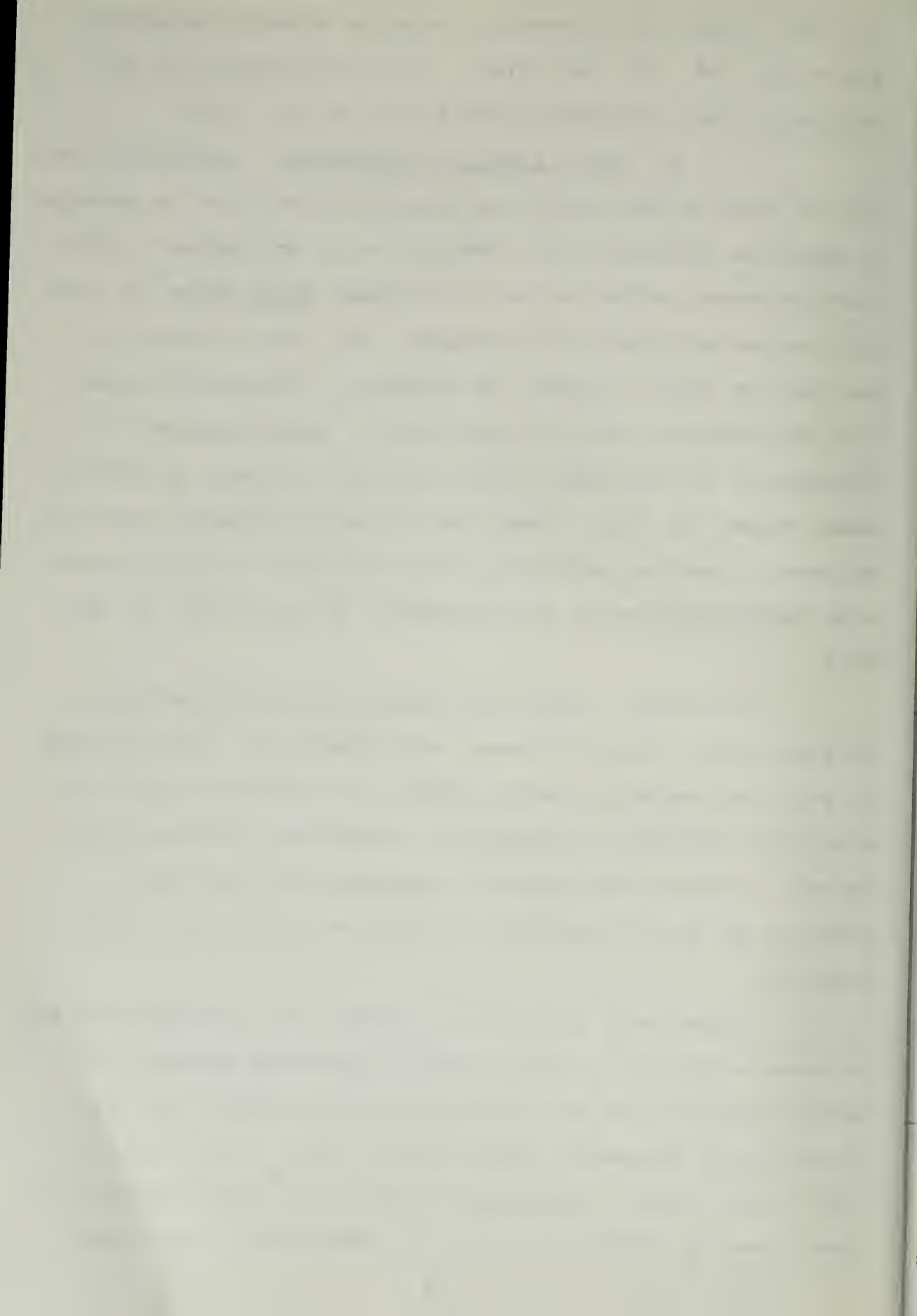


750, No. 22(d)); and concerning sales to discount department stores (R. 745, 750, No. 22(e)). The Court denied the production of such documents as to R.C.A. (R. 127, 129).

b. As to appellee Frigidaire: Appellants moved for an Order to Show Cause why documents should not be produced by appellee Frigidaire (R. 298-322), as it had failed to produce documents called for in the subpoena duces tecum (R. 302-307) served upon one of its managers, Mr. John C. Shaw, Jr., and took no steps to quash the subpoena. Frigidaire claimed that the subpoena was not served upon a "managing agent" of Frigidaire; and objected to the broadness of Items 11 and 12, among others (R. 353). Among the documents requested were all salesmen's reports pertaining to or relating to any conference with representatives of any defendant, or plaintiffs (R. 305-306).

~~-----~~ The Court limited the demand to reports pertaining to plaintiffs, discount houses, and agreements, understandings or policies concerning retail prices, or terms and conditions upon which retailer or distributor defendants purchased, received, or advertised household appliances (R. 419-420), adopting the precise position of appellee Frigidaire on the question.

Appellants continued to request the production of all salesmen's reports or field reports concerning meetings between Frigidaire and the retail defendants (Motion for the Production of Documents, filed June 5, 1964, Item 15, R. 422-425; Motion for the Production of Documents, filed November 17, 1964, Items 20, 22(c), (d), (e), R. 745-749-750; Plaintiffs'





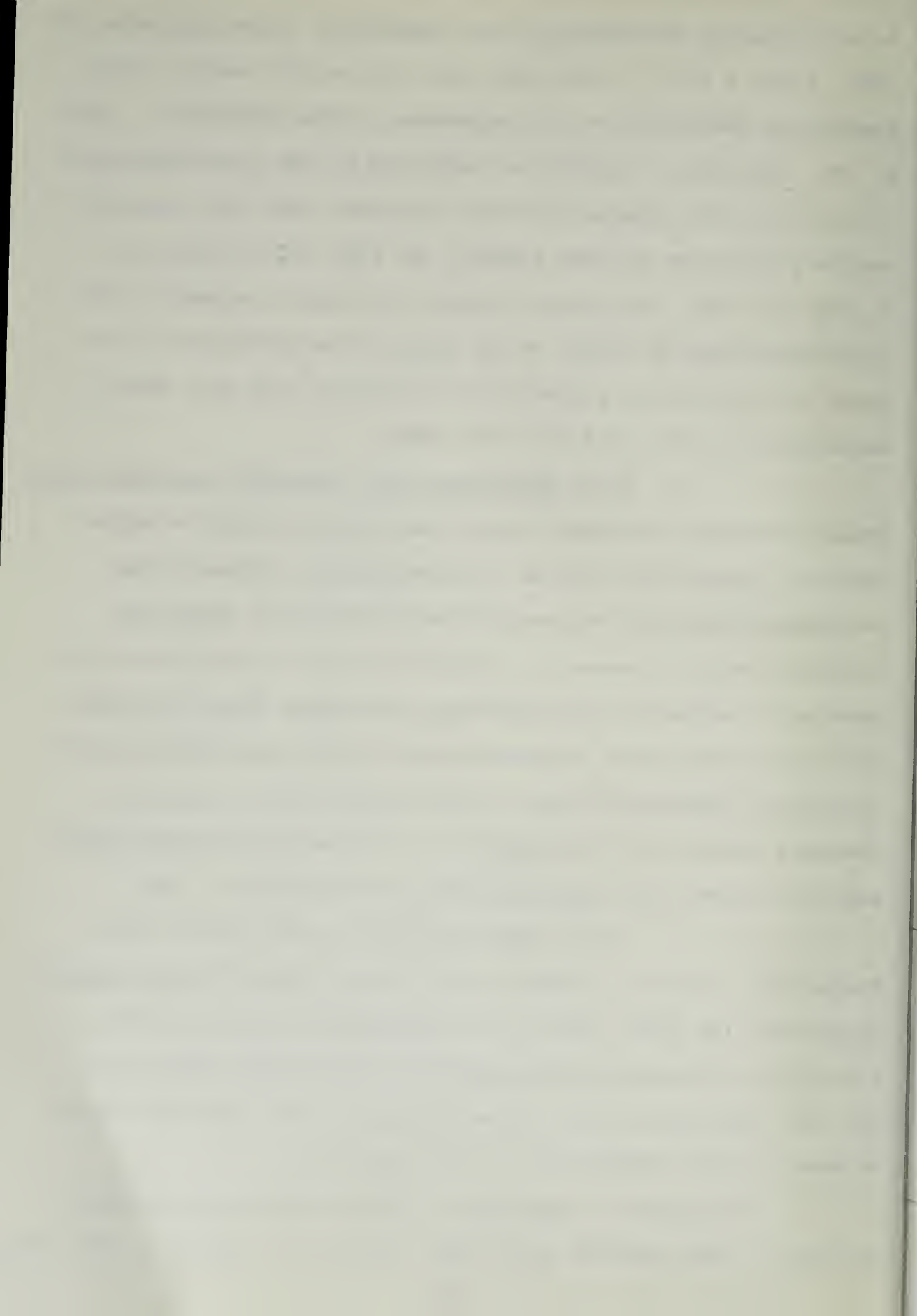
Interrogatories Addressed to All Defendants, filed September 29, 1964, Items 2 to 6, R. 625-626; and Plaintiffs' Second Interrogatories Addressed to All Defendants, filed December 7, 1964, R. 790, 791-792.) Frigidaire responded to the Interrogatories by claiming all reports have been produced, but also objected to the production of such reports (R. 648, 649 and 803-804; R. 540; R. 878). The Court refused to require answers to the Interrogatories (R. 671), or to require the production of reports by Frigidaire, pertaining to meetings with the retail defendants (R. 419, 615; R. 977, 980).

c. As to appellees G.E., Hotpoint, and Whirlpool:

These defendants objected to each and every attempt of appellants to obtain the reports of conversations between their representatives and representatives of Hale and other San Francisco retail stores; of letters to their distributors pertaining to requests from appellants to obtain their products; of conversations with representatives of Hale and other retail defendants concerning sales or the possibility of sales to discount stores; and of reports of conversations between their representatives and representatives of appellants. See:

(1) Item 15 of Plaintiffs' Motion for Production of June 5, 1964 (R. 422, 425), and G.E. and Hotpoint objections (R. 507); Item 15 of Plaintiffs' Motion for the Production of Documents Addressed to Distributor Defendants (R. 434, 437), and G.E.'s objections (R. 507); and the Orders entered (R. 672 (Hotpoint), R. 679 (G.E.)).

Whirlpool's objections to the motion for production of June 5, 1964 (above) at R. 524; order as to Whirlpool (R. 598).



(2) Plaintiffs' Interrogatories to all defendants, September 29, 1964 (R. 625-626); and objections of G.E. (R. 669, see Pre-trial hearing, October 16, 1964, P.Tr. 6-10), and of Whirlpool (R. 642); and Order entered thereon (R. 671).

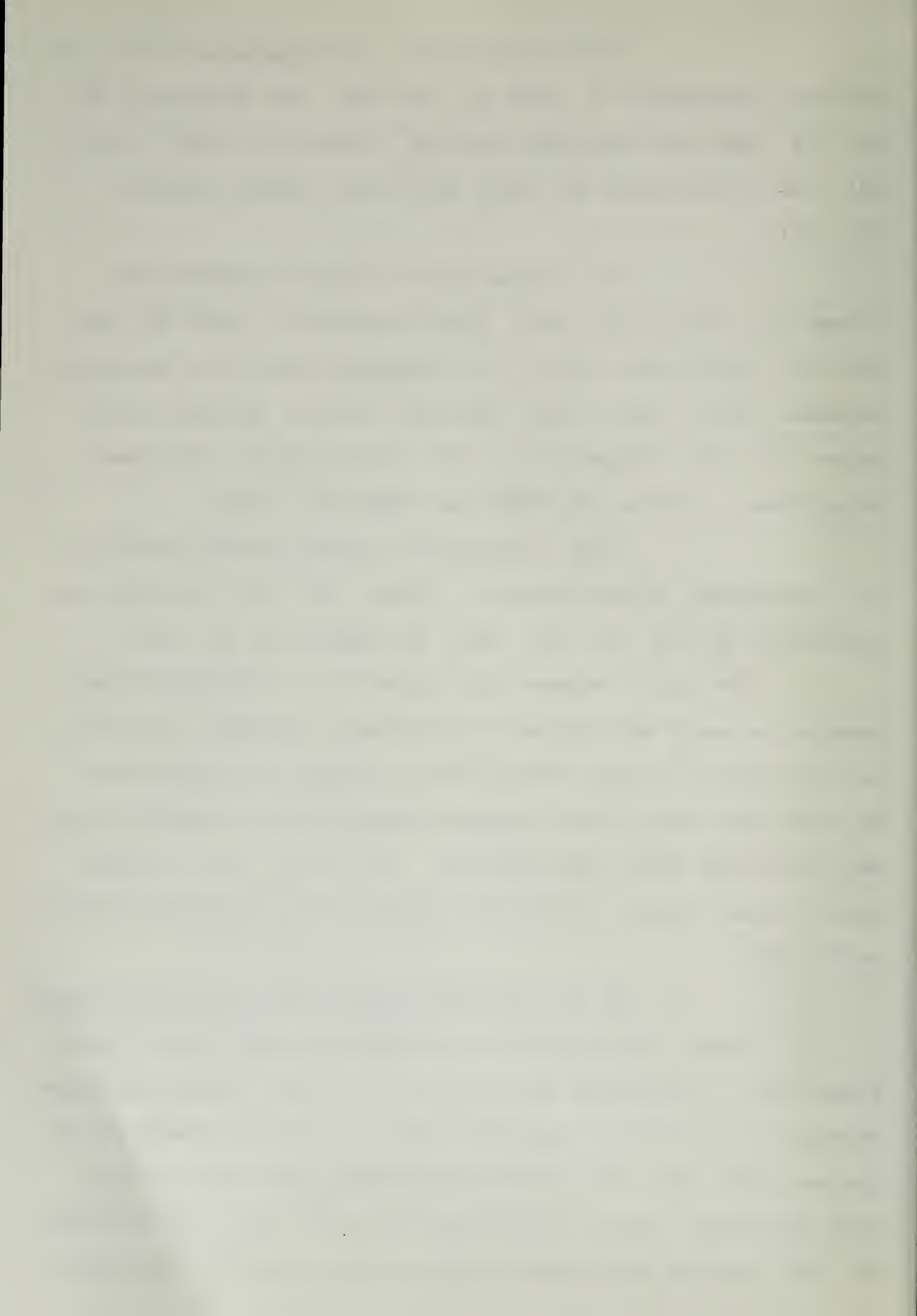
(3) Appellants' motion for production (Items 20, 22(c), (d), (e),) filed November 17, 1964 (R. 745, 749-750); objections of G.E. and Hotpoint (Pre-trial Hearings, December 30-31, 1964, P.Tr. 244-248; 255-259; 287-293); and orders (R. 1061 (Hotpoint) R. 1055, 1058 (G.E.)); Whirlpool objections to motion (R. 893); and order (R. 1017).

(4) Plaintiffs' Second Interrogatories to All Defendants, filed December 7, 1964, (R. 790, 791-792); and objections of G.E. (R. 797, 798), and Whirlpool (R. 809).

The Court ordered that answers to the Second Interrogatories would be limited to statements expressly referring to appellants, and not those having reference by implication or inference; and did not require defendants to identify attorney interviews with other parties. (R. 970). G.E.'s subsequent answers appear at R. 1237; Whirlpool's subsequent answers at R. 1050.

d. As to appellees Maytag and Maytag West Coast:

These companies did not object to appellants' interrogatories. See Maytag answers (R. 652, 657). These appellees objected to Item 15 of the June, 1964 motion for production of documents (R. 424, 425) on the ground they did not have any such documents: Maytag objections to motion (R. 559) and Order (R. 784); Maytag West Coast objections to motion (R. 554) and





Order (R. 787). These appellees responded the same way to Plaintiffs' Second Interrogatories (R. 1023, 1028); after objection (R. 84

Maytag and Maytag West Coast objected to the Items 20, 22(c), (d), (e) of Plaintiffs' Motion for the Production of Documents: as to Maytag (R. 745) and as to Maytag West Coast (R. 687). (Maytag objections (R. 851) and order thereon, denying only Items 22(d) and (e) (R. 1006); Maytag West Coast objections (R. 865) and order thereon (R. 1010).)

The pre-trial order of Judge Weigel, dated March 14, 1963 (R. 270), had expressly made available to all defendants the memoranda and notes prepared by representatives of plaintiffs for their attorneys.

#### E.

#### The Trial

The trial commenced September 3, 1965, and evidence was taken until November 8, 1965, at which time appellants rested their case and moved for the application of all evidence theretofore received against any single defendant or co-conspirator, against all defendants (Tr. 6604, 6605, 6608).

All the appellees jointly and separately then moved for a directed verdict and a dismissal of the case (Tr. 6609): Hale, R. 1782; Borg-Warner, R. 1794; R.C.A., R. 1807; Frigidaire, R. 1821; Whirlpool, R. 1865; G.E., R. 1883; California Electric, R. 1902; Maytag and Maytag West Coast, R. 1894.

Argument on the motions was heard on November 10, 1965 (Tr. 6632-6827). The jury was recalled on November 15, 1965 when various additional exhibits of appellants were placed

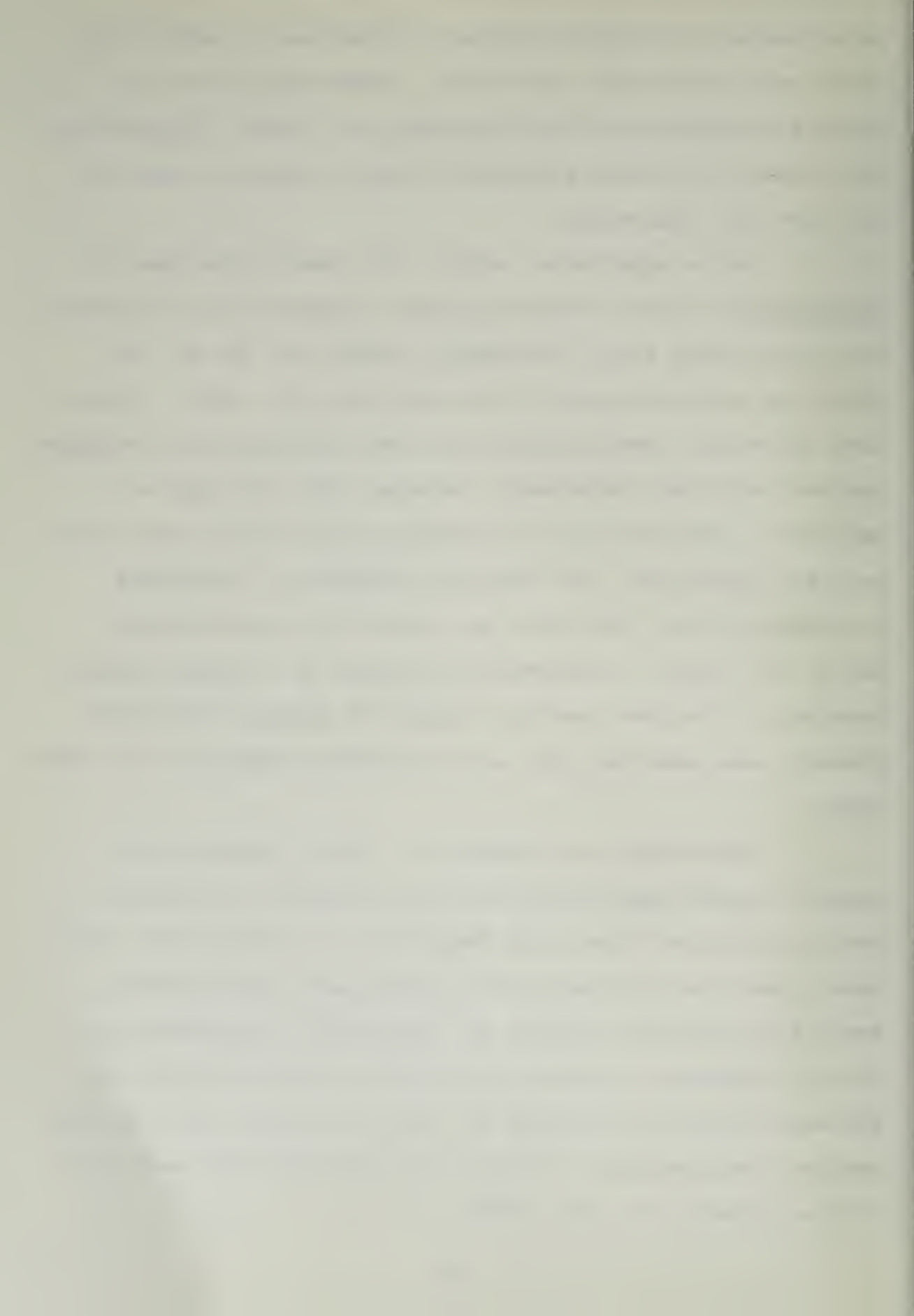


in evidence, and certain motions by appellees to strike evidence were granted (Tr. 6836-6902). Thereafter, the Court granted the motions of the defendants (Tr. 6916). In granting the motions, the Court prepared an opinion which he read to the jury (Tr. 6902-6918).

As to appellants' motion, the Court ruled that all documentary evidence offered against a defendant or co-conspirator would apply to all defendants, except Pl. Ex. No. 491, which was admitted against Frigidaire only (Tr. 6854). Testimony of certain conversations which were admitted into evidence against individual defendants, however, was not applied against all defendants: the testimony of Mr. Bert Green, witness for appellants, who testified concerning a telephone conversation (Tr. 5507-5515) was limited to appellee Borg-Warner (Tr. 6854). Conversations between Mr. Bernard Freeman, president of Manfree, and Mr. Muntain of appellee California Electric were admitted only as to California Electric (Tr. 6853-6855).

Thereafter, on November 26, 1965, judgment was entered against appellants entitled "Judgment on Directed Verdict and Order Dismissing Complaints" (R. 1977-1978). The Court also filed its Memorandum Opinion and Order granting motions for directed verdict (R. 1912-1976). Following the entry of judgment, a hearing upon bills of cost filed by appellees was held on November 30, 1965, and costs were assessed against the appellants in the sum of \$22,089.63 and made part of the judgment (R. 1978, 1979).





Rulings of the Trial Court  
As to Appellants' Evidence, and Costs

It is submitted that the record shows that the trial court erroneously ruled in many instances upon the inadmissibility of appellants' evidence offered, in its interpretation of the issues to be tried, in its pre-trial discovery orders, and in taxing costs. These errors have been detailed in appellants' Specification of Errors (Appendix A), and may be highlighted as follows:

1. The Court ruled that the corporate defendants and co-conspirators were not bound by the statement or actions of their sales representatives. It apparently held that such persons were not managing agents, or agents of sufficient authority to bind their principals by their words and deeds. However, the record is replete with evidence that such persons were clothed with authority by their principals to deal with stores such as appellants, take purchase orders, and discuss sales policy.

a. It was ruled that California Electric was not bound by the statements of its salesman, Mr. Muntain, as to matters within the scope of his authority. (Tr. 3932-3933, 3940-3941).

b. It was ruled that appellee R.C.A. was not bound by the statements of its field sales representative for the entire State of California, Mr. Gentile (Tr. 4645-4648, 4748-4750).

c. It ruled that Mr. Erickson and Mr. Carlson,

THE HISTORY OF THE  
CITY OF BOSTON

From its first settlement in 1630 to the present time. By  
JOSEPH NEASE, Esq. of the Middle Temple, Barrister at Law.  
In two Volumes. The first Volume contains the History from  
1630 to 1780. The second Volume contains the History from  
1780 to the present time. With a Plan of the City, and a  
List of the Magistrates, from 1630 to the present time.

BOSTON: Printed and Sold by J. NEASE, at the Sign of the  
Three Stars, in the City of Boston. 1780.

THE HISTORY OF THE CITY OF BOSTON, FROM ITS FIRST  
SETTLEMENT IN 1630 TO THE PRESENT TIME. BY JOSEPH  
NEASE, ESQ. OF THE MIDDLE TEMPLE, BARRISTER AT LAW.  
IN TWO VOLUMES. THE FIRST VOLUME CONTAINS THE HISTORY  
FROM 1630 TO 1780. THE SECOND VOLUME CONTAINS THE  
HISTORY FROM 1780 TO THE PRESENT TIME. WITH A PLAN OF  
THE CITY, AND A LIST OF THE MAGISTRATES, FROM 1630 TO  
THE PRESENT TIME.

BOSTON: Printed and Sold by J. NEASE, at the Sign of the  
Three Stars, in the City of Boston. 1780.

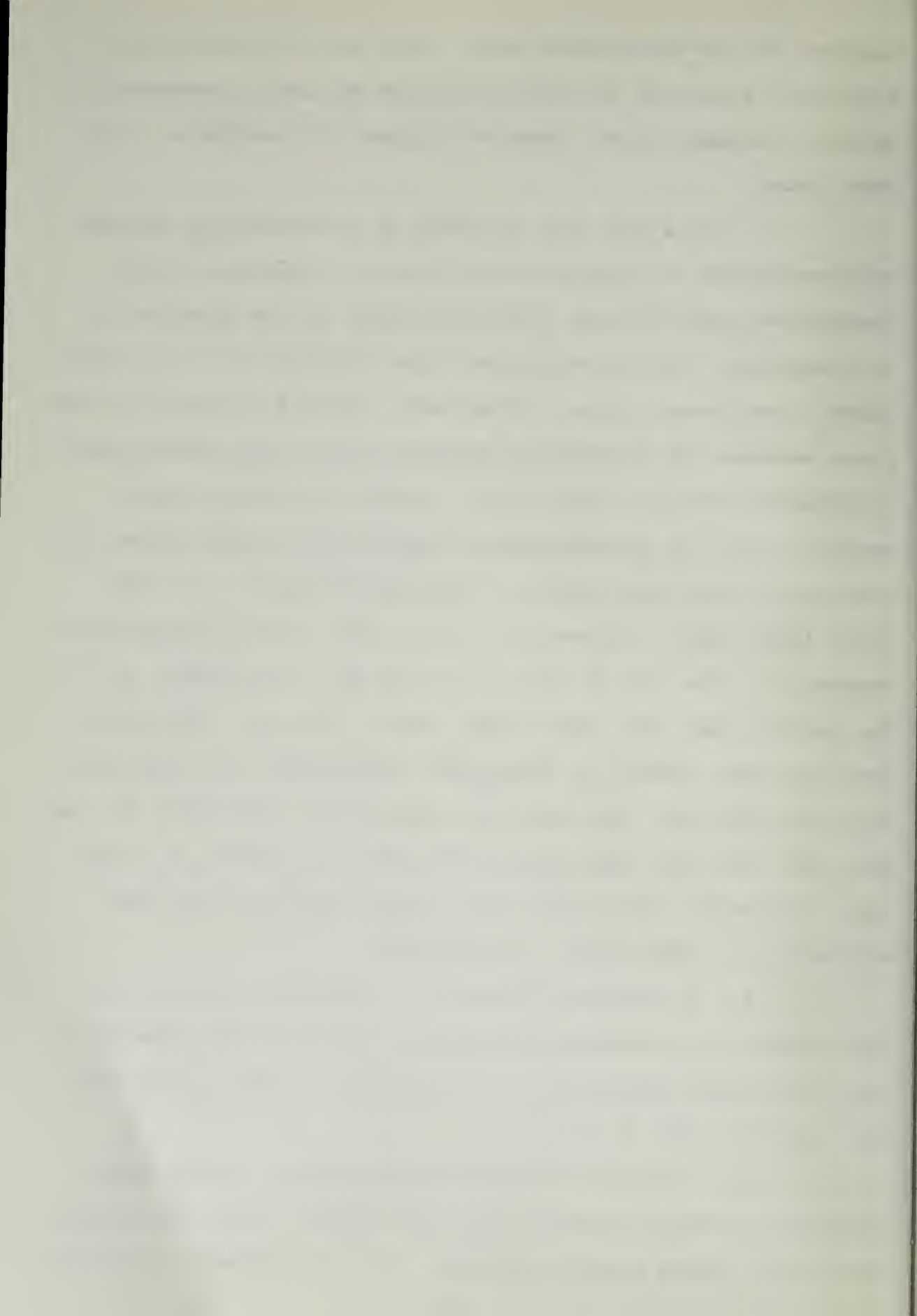
THE HISTORY OF THE CITY OF BOSTON, FROM ITS FIRST  
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HISTORY FROM 1780 TO THE PRESENT TIME. WITH A PLAN OF  
THE CITY, AND A LIST OF THE MAGISTRATES, FROM 1630 TO  
THE PRESENT TIME.

salesmen for co-conspirator Meyer, were not in positions of sufficient authority to permit evidence of their conversations with Mr. Freeman and Mr. Boyd of Manfree into evidence. (Tr. 4846, 4984).

2. It ruled that evidence of conversations between representatives of appellants and those of appellee and co-conspirator distributors, would not apply to the appellee or co-conspirator factory supplying those distributors with price lists, advertising funds, and product; despite evidence of complete exchange of information between factory and distributor, of repeated visits to such local vendors by factory representatives, and of correspondence dealing with local prices and policing of the local market. Memorandum Opinion, R. 1912, 1923, 1929, 1933. But see Pl. Ex. for Id. No. 431 (Appendix B herein); Pl. Ex. for Id. Nos. 343, 344 (Tr. 6497-6508); Pl. Ex. for Id. Nos. 348, 5060, 5061, 5068, 5070; Tr. 1210-1217; Tr. 2362-2368, 2389; Tr. 2590-2592; 2629a-2643; Tr. 2914-2916; Tr. 3090-3092; Tr. 3246-3252; Tr. 3588-3592, 3610-3612; Pl. Ex. Nos. 349, 350; Tr. 4965-4701, 4707-4708, 4716-4717; Tr. 4724-4727, 4728-4730, 4732-4735, 4738, 4744-4745; Tr. 4751; Tr. 4768-4769; Tr. 4860-4861; Tr. 5021-5028.

3. It refused to apply the express admissions of Mr. Valenson of California Electric, either to that appellee, or to any other appellee or co-conspirator. (See Specification of Error, No. V, A, 1).

4. It would not permit appellants to prove their attempts to obtain products from Los Angeles, while the boycott was in full force against Manfree. (See Specification of Error,





5. It refused to permit appellants to introduce evidence proving that co-conspirators Meyer and Hale worked together to investigate the sources of supply of R.C.A. products being sold by a discount store in the San Francisco Bay Area. It also precluded proof that Meyer and appellee R.C.A. worked together to prevent Spiegel Outlet Stores, a retailer who advertised R.C.A. at "cut prices" in San Francisco newspapers, from obtaining R.C.A. television sets, either locally or by transshipment. (See Specification of Error, Nos. V, I, 3; and V, D, 6.)

6. It refused appellants' offers to prove that Hale had the purpose and intent to control local retail competition in the products involved, by proof of Hale's earlier efforts to deprive a neighboring store on Mission Street, San Francisco, of the leading brands of such products. (See Specification of Error No. V, I, 21-22.)

7. It ruled that appellants could not introduce evidence to show that appellee G.E. had admitted that its local dealers did not engage in retail price competition; and that it had recognized, in intra-company correspondence, that franchising a discount store in the San Francisco area would seriously jeopardize its accounts with local large appliance and department stores. (See Specification of Error, No. V, C, 1.)

8. It refused to admit testimony that co-conspirators Graybar and Westinghouse were subjected to pressure from San Francisco dealers to prevent them from selling to discount stores, and were threatened with a loss of such retail accounts





if they did so. (See Specification of Error, Nos. V, C, 3-4; and V, I, 4.)

9. It rejected appellants' offer to show that appellee Maytag admitted that it had made a conscious change in its sales policy, when it cancelled Manfree's franchise, and refused to sell to appellant further. This ruling was made despite Maytag's defense that the inefficiency of Manfree's sales force was its reason for refusing to deal. (See Specification of Error No. V, G, 2.)

10. It refused to permit appellants to prove the contents of conversations between Mr. Alpine, U.S.E.'s president, and various representatives of the vendor appellees and co-conspirators, on the grounds that Mr. Alpine died before defendants were able to cross-examine him concerning memoranda prepared for his attorneys, concerning such conversations. (See Specification of Error No. V, H.)

11. It taxed items of costs improperly allowed to appellees under law. (See Specification of Error No. IX.)

#### G.

#### Questions Presented

1. Did the evidence presented by appellants, given the benefit of all inferences it fairly supports and viewed as a whole, allow reasonable men to conclude that a combination and conspiracy between appellees and co-conspirators existed, with the purpose and result of boycotting appellants, preventing them from purchasing and advertising major appliances and television sets?

2. Did each individual appellee participate in that



combination and conspiracy?

3. Did the Court commit prejudicial error in excluding evidence offered by appellants?

4. Did the rulings of the Court during trial, preventing appellants from calling former employees and officers of appellees as adverse party witnesses under F.R.C.P. Rule 43(b), or from calling such representatives of co-conspirators as unwilling or hostile witnesses under Rule 43(b), and limiting appellants' cross-examination of such witnesses, erroneously prejudice appellants?

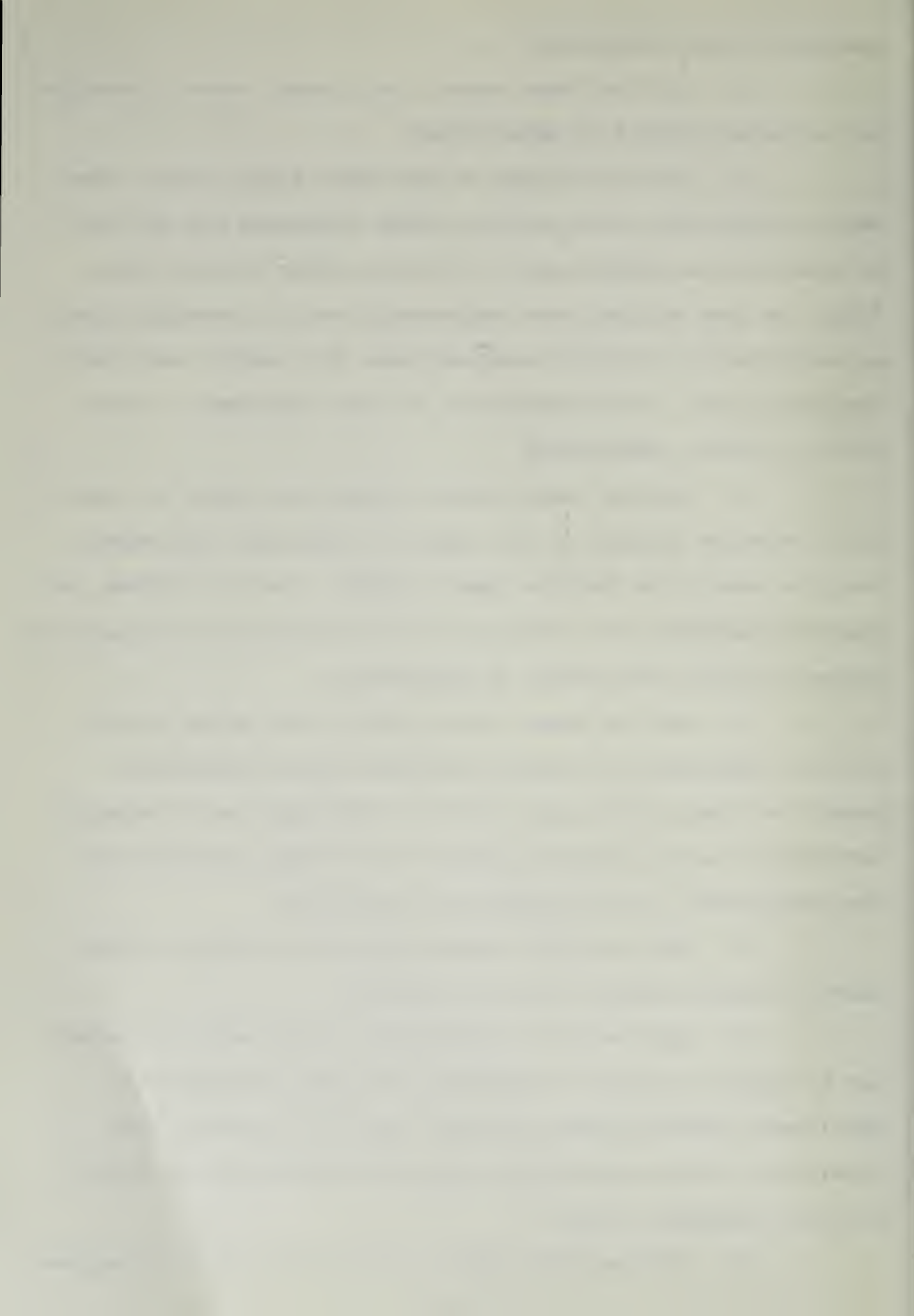
5. Did the Court commit prejudicial error in ordering a separate verdict on the issue of liability, not permitting the case to be decided upon a single, overall verdict, and thereby precluding the introduction of any evidence of quantative injury to their businesses, by appellants ?

6. Did the Court commit prejudicial error in not allowing appellants to present evidence against appellees, based upon their entry into vertical conspiracies to maintain list prices on the subject products with other appellees and co-conspirators, to the injury of appellants?

7. Did the Court commit prejudicial error in dismissing appellee Norge Sales as a party?

8. Did the Court commit prejudicial error in refusing to apply evidence of statements and acts of certain of appellees' managing agents against them, and against other appellees, and in refusing to allow such declarations and admissions probative value?

9. Did the Court commit prejudicial error in denying





certain pre-trial discovery procedures, and thereby discovery of material evidence, to appellants?

10. Did the Court grant costs to appellees which were not properly taxable against the appellants?

H.

Statement of Facts

1. Major Appliances and Television Sets Were Advertised and Tagged at Factory List Prices by Defendant Retailers in San Francisco:

a. List prices on retail sales were established by the vendor defendants and followed by the defendant retailers:

The manufacturers of the subject products published price lists covering their respective models for distribution to the trade, with list (or retail) prices shown thereon; as demonstrated by the following evidence:

- (1) Frigidaire: Pl. Ex. Nos. 1903-1908;
- (2) G.E.: Pl. Ex. Nos. 1909-1916, 1937, and 4130;
- (3) Hotpoint: Pl. Ex. for Id. No. 5050;
- (4) Maytag: Pl. Ex. Nos. 1920, 5017;
- (5) R.C.A.: Pl. Ex. No. 1947;
- (6) Whirlpool: Pl. Ex. Nos. 1933, 1934, 1935 and 676;
- (7) Borg-Warner (Norge Sales): Pl. Ex. No. 1924;
- (8) Philco: Pl. Ex. Nos. 1899, 5020, 1943, 1944 and 5022; see also Pl. Ex. for Id. No. 5019.

The distributors prepared price sheets based upon these factory price sheets, for submittal to their retailers.





In San Francisco, most of the distributors adopted a policy of publishing "coded" price sheets, by which different retail dealers were granted different purchase prices. But despite the fact that the prices charged for the same model varied (dependent on the particular dealer's coded price sheet), all price sheets contained the identical list price. So-called "volume discounts" in dealer prices were in reality based upon the dealer's status with the supplier, and not upon the volume of orders given.

For evidence of this nature relating to distributors, see:

- (1) California Electric: Pl. Ex. Nos. 1899, 5022; 1926-1931; (see also Pl. Ex. Nos. 62A-F, 63, 65, and 66).
- (2) Lancaster: Pl. Ex. for Id. Nos. 1922, 1923.
- (3) Meyer: Pl. Ex. Nos. 1948, 1936.
- (4) Graybar: Pl. Ex. Nos. 1917, 1918, and 1938.
- (5) Maytag West Coast: Pl. Ex. Nos. 1921, and 4346.

These list prices were given to the retailers in price sheets disseminated by the distributors:

- (1) Hale-Meyer (R.C.A.-Victor): Pl. Ex. Nos. 1963 and 1948.
- (2) Hale-Meyer (Whirlpool): Pl. Ex. Nos. 1963 and 1956.
- (3) Hale-Calectron: Pl. Ex. No. 5073.
- (4) Hale-Maytag West Coast: Pl. Ex. Nos. 4346, and 4347.
- (5) Hale-G.E.: Pl. Ex. Nos. 1953 and 1954.



- (6) Hale-Frigidaire: Pl. Ex. Nos. 1952 and 1950; (see also 1903-1908).
- (7) Hale-California Electric: Pl. Ex. Nos. 1958, 1927, 1928, 1929, 1930, 1931, and 1949.
- (8) Hale-Lancaster: Pl. Ex. No. 1957.
- (9) Hale-Basford: Pl. Ex. Nos. 3051, 3052, and 1901.-
- (10) Hale-Sylvania: Pl. Ex. Nos. 334.
- (11) Hale-Westinghouse: Pl. Ex. No. 1955.

b. Retailers were required to advertise at factory list prices in order to receive co-operative advertising funds from defendant vendors:

Newspapers charge national firms, such as the manufacturers of the products involved in this case, much higher advertising rates than they do local retailers. (Pl. Ex. No.-4345). Thus manufacturers make available large advertising funds to selected retailers so that these local concerns will advertise their products in local newspapers and other local advertising media, taking advantage of the less expensive rates. These funds potentially can be used for such advertising under the authorization of the factory itself, or of its distributor, or by all retail dealers handling the products in a particular competitive (market) area like San Francisco. Such funds may also be used to sponsor and support the advertising of the factory's products under the listed name of the leading or "key" dealers in the market area.

The factory appellees and co-conspirators generally divided their advertising moneys into three types of funds



for use in the San Francisco market area: (i) regular "co-operative" advertising funds, (ii) "key market" advertising funds, and (iii) funds earmarked for specific retail accounts, called "Special Funds" or "Key Dealer Funds" (or other such special identification by letter or number). All advertising funds are made available by the factory directly, or through its distributor, to the retailers. In the case of the special funds, the money is earmarked specifically for the use of certain "key" retailers who enjoy special advertising rates. The evidence of this nature relating to the factory appellees and co-conspirators may be seen as follows:

- (1) Norge: Pl. Ex. Nos. 4089, 4350, 4357, 4359, 4098, 4099, 4101, and 644.
- (2) Philco: Pl. Ex. Nos. 655, 654, 656, 342, 1369, 1847-1898, 4349, 866, 70-73, 75, 77-79, 646, 647, 648, and 1740.
- (3) Maytag: Pl. Ex. Nos. 1059, 1034, 1035, 1081, 337, 772, and 773.
- (4) Frigidaire: Pl. Ex. Nos. 637, 937, 2081, 2058, 2060, 2061, 2064, 2068, 2070, 2059, 4297, 781, 921, 928, 933 and 934.
- (5) G.E.: Pl. Ex. Nos. 712, 713, 715, 714 and 717.
- (6) Hotpoint: Pl. Ex. Nos. 1094-1107, 28, 4384, 4385, 4386, 4387, 4390, 4388, and 4389.
- (7) R.C.A.: Pl. Ex. Nos. 99, 575, and 1846.
- (8) Whirlpool: Pl. Ex. Nos. 5081, 667, 5085, 5084, 4237, 665, 658, 686, 687 A-C, 688, 689, 4236,





From this evidence, it may be seen that regular co-operative advertising funds are generally earned by the retailer based on the total amount of its purchases over a given period of time. Key market advertising funds are specifically designated by the factory to promote its models in a certain metropolitan area. Special funds or key dealer funds are designated by the factory for the use of particular retailers.

Most of the advertising of the subject products conducted in San Francisco was placed by co-conspirator Hale and the other retail store co-conspirators, who received all three types of funds. (Id., and see Tr. 3162-3165).

Armed with extensive advertising funds, mostly provided by the factories, the local appellees and co-conspirator distributors enforced a price-advertising program which required the local retailer to advertise at list price. See, for instance:

(1) California Electric: Pl. Ex. No. 342; which reads, in relevant part (Ex. No. 342 C):

"Co-operative credit not approved under following circumstances:

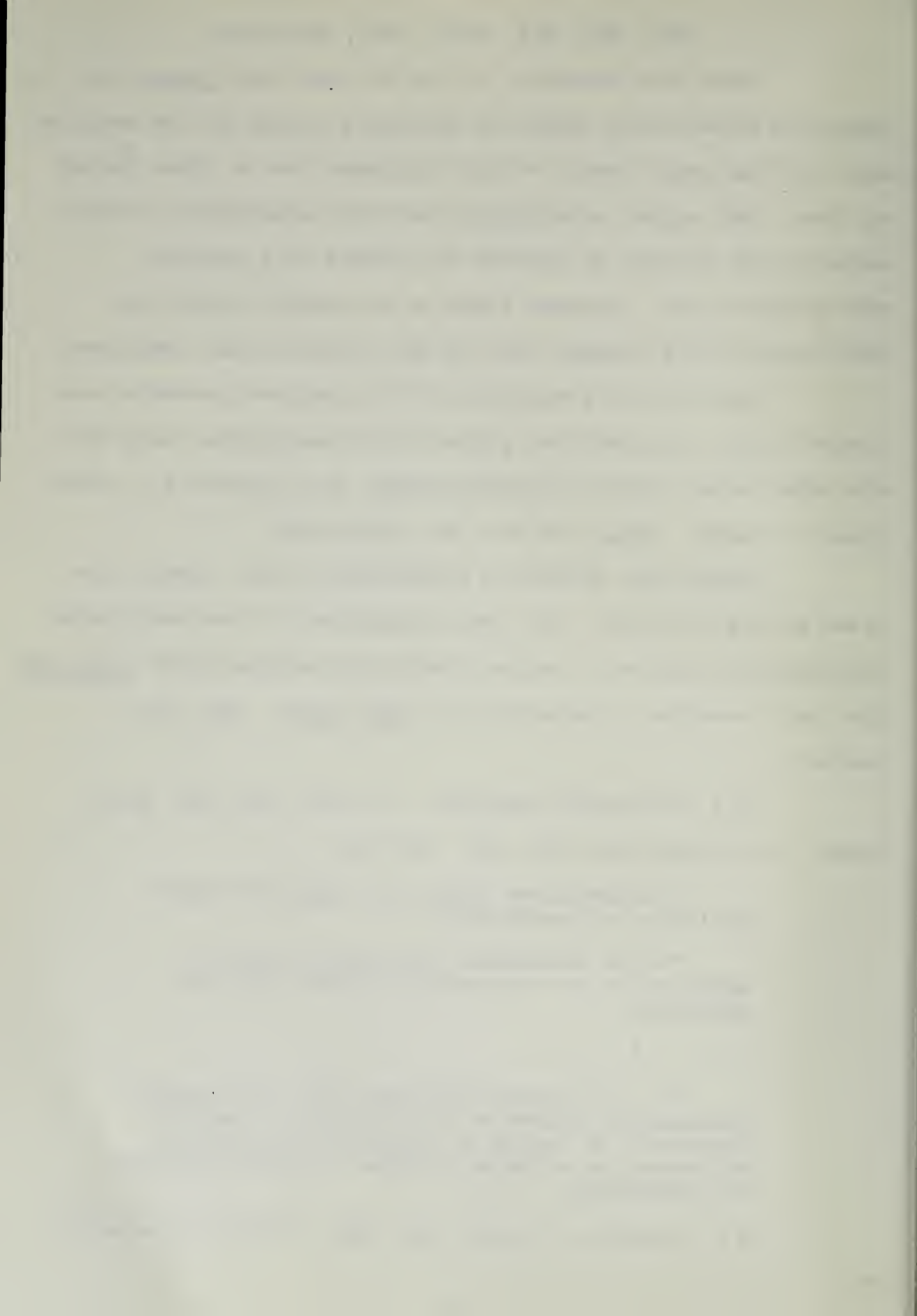
"It is understood and agreed that no application for cooperative credit will be approved . . .

\* \* \* \* \*

"C. If prices are other than our current recommended prices or if ad offers a form of discount, or states an unauthorized specific allowance as a trade-in offer in either dollars or percentage . . ."

(2) Graybar: Pl. Ex. No. 339A, effective January 1,

1959:



"I. From time to time advertising monies will be made available to franchised Hotpoint dealers serviced by Central Pacific District of Graybar Electric Company, Incorporated.

"II. These advertising monies must be authorized in advance, in writing, on Graybar form SF 922. The form must be initialled by Graybar field representative and countersigned by authorized Graybar management.

\* \* \* \* \*

"IV. All advertising must conform to the following basic rules:

\* \* \* \* \*

"D. No credits will be issued on advertising which is run below minimum recommended advertised price. A list of these prices is attached. This list will be amended from time to time as competitive situation warrants."

(3) Maytag West Coast: Pl. Ex. No. 337 reads, in relevant part, concerning Hale's advertising in "San Francisco Papers" in 1959:

" . . . Advertisement not to show list price or cut price, but will show only X number of dollars per week.

\* \* \* \* \*

"4. The distributor will not pay for classified advertising; advertising containing unauthorized price reductions; advertising that is misleading or false in any way; newspaper advertisements containing fewer than four columnages; radio or television advertising consisting of fewer than 12 10-second announcements or the equivalent thereof."

(4) Lancaster: Pl. Ex. No. 4355 reads as follows, in relevant part:

"TO ALL DEALERS:

"In order to better serve you and your company and to expedite your cooperative advertising claims, please be advised that the following

THE UNIVERSITY OF CHICAGO  
DIVISION OF THE PHYSICAL SCIENCES  
DEPARTMENT OF CHEMISTRY

REPORT OF THE  
COMMISSIONER OF THE  
BUREAU OF CHEMISTRY  
FOR THE YEAR 1900

CONTENTS

ANNUAL REPORT OF THE COMMISSIONER OF THE BUREAU OF CHEMISTRY

RESEARCH REPORTS

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processess (sic) will be in effect January 1, 1961 through December 31, 1961:

\* \* \* \* \*

"5. To qualify for co-op participation, all ads must conform to Motorola, Norge, KitchenAid, Eureka and York Co-Op Policy . . .

\* \* \* \* \*

"7. All newspaper ads must carry product illustrations and all advertising must be only on current models with suggested retail prices or monthly terms . . ."

(5) G.E.: Pl. Ex. Nos. 714, 717, and 708: Ex. No.

708 is a letter dated September 28, 1961, on G.E. stationery ("Major Appliance Division . . . General Electric Company, Northern California District") addressed to Mr. Carol Rogers of co-conspirator Hale, as follows:

"Dear Carol:

"Attached is the layout for your October Home Fair that we discussed the last time I was in to see you.

"We would recommend a price of \$259.95 on the WA850 washer and \$209.95 on the SP50V dishwasher. In so far as the LJ12 refrigerators are concerned, since you are the only dealer in the market who has any of these on hand, you are free to price this as you see fit. I would suggest you check with Mr. Thomas on this for his recommendation.

\* \* \* \* \*

"Very truly yours,  
"/s/ Tom Crossley  
"T. A. Crossley  
"Sales Training Specialist

"TAC  
"Attachment"

(6) Frigidaire: Pl. Ex. No. 338 (Frigidaire's

"Cooperative Advertising Plan" for 1955-1957) reads as follows





n relevant part, under "general Provisions":

"4. The basis for determining the extent of such participation will be 1% of the suggested retail price at the end of each month, of eligible products billed to the Dealer, or a fixed amount established by the Factory on certain eligible products . . . but the amount of participation with any one dealer should not exceed 5% of the suggested retail price of eligible products billed to the Dealer . . . (pr. 1-2).

\* \* \* \* \*

"Under no conditions should prices or price copy be changed from that originally contained in the printed material furnished by the Factory, either direct or through Frigidaire's advertising agency, for Factory-paid (national) advertising.

" Ads that may be run over the District's signature that mention price or prices must use the current factory suggested prices, and reference thereto in the advertising must follow precedent established in factory-paid (national) advertising ads; otherwise, the advertising will not be eligible for Co-op participation . . ." (pg. 6)

See, also, factory-established prices at pp. 24-25 of Ex. No. 338.

(7) Meyer: Pl. Ex. No. 1161 is a form of Meyer's co-operative advertising agreement made with all its retailers. This Exhibit reads, in relevant part:

" Dealer Co-operative Advertising Agreement

\* \* \* \* \*

" Important regulations on reverse side-please comply. . .

" Participating Advertising - Reimbursement will not be allowed for advertising in which is featured other products competitive to the product being advertised. (On reverse side.)

" Price Cutting - Reimbursement will not be made for any advertising featuring a cut price." (On reverse side.)



Mr. Richard Sanford, as a former officer of co-conspirator Hale, testified as follows concerning the operation of the Meyer advertising program for retailers in the San Francisco market:

"(MR. SANFORD): We had to advertise in the newspaper at the suggested list or at no list at all in order to get any co-operative money from the Meyberg Company.

"Q. If you put a price at less than the distributor's suggested list you would not get any co-operative advertising, is that correct?

"A. That is correct." (Tr. 603).

See, also, Pl. Ex. No. 1956 (A-AF), Meyer price lists for Whirlpool appliances given to Hale, and containing "list prices" and "suggested list prices" (Tr. 615-625).

(8) See also Basford (Zenith brand): Pl. Ex. No. 3054.

c. The Retail price shown on the retailer defendants' price tags corresponded with the defendant factory or distributors' list prices:

The large advertising retailer thus also "tagged" (the price marked on the tag affixed to the individual unit on the floor of the store) the products involved here, at the list price. (Tr. 600-604; 1891-1892; 1743-1746; 2273-2274). The list prices of the factories and distributors allowed large margins; well over 30% (see the price sheets admitted in evidence, identified above).

The policy of appellant Manfree was to sell at a



retail price based on cost, plus 20%. This policy clearly was in conflict with Hale's admitted desire to maintain higher margins of 30% to 40% over costs, on identical or similar merchandise. (Pl. Ex. Nos. 349, 350, 5078; Tr. 270-271).

Pl. Ex. No. 4227, an intraoffice memoranda between personnel of appellee Whirlpool, shows the ability of the key dealers in San Francisco to demand and receive larger margins. The letter states, in pertinent part:

" . . . Dealers percentage will be an advertised list of \$289.95 to correspond with the larger margins requested in the San Francisco area by the accounts due to local situation."  
(Tr. 5137)

2. Joint and Collaborative Relations Among Co-conspirator Hale and The Factory Defendants were Established By Substantial Evidence.

The manufacturers of major household appliances and television sets sought to make Hale, or the other retailer defendants, their major representatives in San Francisco.

Each factory defendant made special advertising funds available to insure that Hale advertised its product in the San Francisco newspapers. <sup>1/</sup> Hale, however, as the evidence shows, refused to advertise a factory's product, knowing the value of the Hale name in the local ad, as a means of applying pressure upon such manufacturer to insure its participation in the conspiracy to refuse to sell the subject products to

---

<sup>1/</sup> See Pl. Ex. Nos. 646, 647. These transactions all occurred in 1957 and 1958, during the time Manfree was selling Philco brand major appliances (Pl. Ex. No. 1523). Hale refused to advertise Maytag products at all in 1958, during the period Manfree was able to obtain and sell Maytag major appliances. (Pl. Ex. No. 4153).





appellants. For this reason, Hale did not use the special advertising funds earmarked for it under Norg'e "Key Account" advertising program in 1957. (Pl. Ex. No. 644). This otherwise unexplained refusal of Hale to use such funds coincided with the period of time that appellant Manfree was selling Norge appliances, i.e., May, 1957 to October, 1957. (Pl. Ex. No. 1523).

Hale deducted large amounts of claimed credits for advertising expenditures from its checks sent to the Philco factory, which deductions were unauthorized by Philco because at the time Hale was not buying sufficient amounts of Philco products to warrant the deductions. (Pl. Ex. Nos. 646, 647, and 4349). Appellee California Electric (the Philco distributor in San Francisco) volunteered \$10,000.00 from its advertising funds to cover Hale advertising costs for Philco ads, after Philco had refused to allow Hale any further advertising funds. (Tr. 3735).

As concerns appellees Borg-Warner (Norge Division) or Norge Sales, advertising funds were made available for Hale and Macy's alone, under the Key Dealer or Key Account Funds (Tr. 2669-2674, 2682-2688, 2700, 5387-5391, 538-542, 2365-2368; Pl. Ex. Nos 4098, 643, 644, 4350, 4351, 4359, 4357, 4098 (B, G, H), 4099, 4101, 4102; see, also, Tr. 2412-2416). In 1959 and 1960 Hale received \$12,000.00 in advertising funds from Norge Sales (Id., and see Tr. 2695-2697). Norge Sales invited Hale's representatives to attend its special factory parties, open only to its "key accounts". (Pl. Ex. No. 4089).



As concerns appellee Hotpoint, it made special advertising funds available to its distributor, co-conspirator Graybar (Tr. 3219-3220, 3223-3248; Pl. Ex. Nos. 4384, 4385, 4386, 4387, 4390, 4388, 4389A-C). In turn, Hale received special Key City funds from Graybar for the advertising of Hotpoint appliances (Pl. Ex. Nos. 1094-1107; see Tr. 1420-1475). The Key City funds of Graybar-Hotpoint were not ordinary co-operative advertising funds (Tr. 3080-3088, 3093-3100, 3123-3124, 3229-3233). Macy's also received extensive advertising funds from Graybar to advertise Hotpoint appliances (Tr. 3162-3165; 3229-3233; Pl. Ex. for Id. No. 4364, Tr. 3258-3264.)

R.C.A. permitted its distributors a basic allowance to develop advertising funds, based on the volume of goods purchased (Pl. Ex. No. 99; see Tr. 4765). But in addition to these co-operative advertising fund allowances, R.C.A. supplied additional advertising funds for particular promotions (Tr. 4765-4766, 4792, 4797). Hale received a special authorization, No. 1001, in the amount of \$2,325.00, relating to R.C.A. Victor (Pl. Ex. No. 575). Hale received extensive advertising funds from co-conspirator Meyer for the newspaper advertising of R.C.A. television sets under Hale's name (Tr. 4857-4860; see, also, Pl. Ex. No. 1846).

Appellee Whirlpool developed a special advertising program for Hale (Tr. 576-577; 1249-1282; 1493-1500; 5068-5073; 5083-5108). Twelve thousand dollars was allowed for a special Hale's promotional program concerning Whirlpool products in 1959 (Pl. Ex. Nos. 689-C, 685A-C, 689A-B, 686A-E, 687A-C, 665, 4236,



4237).

Appellee and co-conspirator manufacturers arranged for special meetings at their main offices, and elsewhere, between their officers and the officers of Hale (Borg-Warner, Tr. 521-523; Hotpoint, Pl. Ex. No. 638; R.C.A., Tr. 536-539, 222-224, 256-259, 574-575; Whirlpool, Tr. 260-280, 1493-1495, 576-579, 587, 1493-1495, 1501-1502).

Appellees Borg-Warner, Whirlpool, and Hotpoint manufactured special models of merchandise for their Key Accounts, which were sold to Hale (Tr. 446, 830-831, 835-836, 1506-1508; Pl. Ex. Nos. 1933, 1934, 1935; see Tr. 5127-5128, Pl. Ex. Nos. 4089 and 5078).

Each of the factories maintained regional representatives in the San Francisco area, and these regional representatives visited Hale and other retail accounts. (Borg-Warner (Mr. Gene Schick), Tr. 2914-2918; 2963-2964; Hotpoint (Mr. Orville Ransome), Tr. 4434-4436; 4445, 4458-4460; R.C.A. (Mr. Dan Gentile, Mr. Wade Brightbill), Pl. Ex. No. 4344, Tr. 4695-4701; 4768-4769; Whirlpool (Mr. James Walker), Tr. 5031-5034; 5041-5046; Frigidaire (Mr. John Shaw), Tr. 4292-4297; 4302-4307).

3. Direct Relations Between the Distributor Defendants and Hale.

Hale was co-conspirator Philco's "Associate Distributor" in the San Francisco area. Appellee California Electric, as the Philco distributor in the area, supervised the allocation of special advertising or promotional authorizations given to Hale as the Associate Distributor. (See Pl. Ex. Nos. 295-





299, 655, 654, 656, 70, 71, 72, 75, 77, 78, 79, 1369, 4349, 4363, 1790, 1847-1898, 866A, 866B; also see Tr. 851-852, 1087-1096).

G.E. allowed Hale 100% paid advertising, and offered it special "closeouts" of certain model numbers. (Tr. 805-806; see Pl. Ex. Nos. 708, 712, 713, 715, and 717).

Frigidaire allowed Hale special funds and "Key City" funds for advertising purposes. (Tr. 746-777, 780-781, 794, 4020-4023, 4256-4259; Pl. Ex. Nos. 937, 4297, 781, 697, 698, 699, 2058, 2060, 2061, 2064, 2068, 2070, and 2059).

Maytag West Coast allowed Hale special advertising funds. (Tr. 3343-3346; Pl. Ex. Nos. 1081, 1059-B, 1061-1062, 1034, 1035, 4054, 772, and 773).

4. Appellees Refused to Deal with Appellant Manfree, and Prevented Appellant United Shoppers Exclusive from Advertising in the Morning Newspapers in San Francisco.

a. Appellant Manfree's leading brands were cancelled:

The evidence is undisputed that the factory appellees, or their Northern California distributors, refused to sell major appliances and television sets to appellant Manfree, and that appellant U.S.E. was unable to advertise at all in the two morning San Francisco newspapers, The San Francisco Examiner and The San Francisco Chronicle. This evidence may be summarized as follows:

When Manfree opened in May, 1957, it was retailing



major appliances manufactured by Philco,<sup>8/</sup> (subject to certain specific limitations concerning advertising these products at a price below the "list price"), Maytag, Hotpoint, and Borg-Warner (Pl. Ex. No. 1523). Manfree was also selling television sets manufactured by Hotpoint, co-conspirator Sylvania, and by Admiral, Emerson and Olympic. It was also selling Admiral brand major appliances, Gaffers & Sattler ranges, Easy appliances, and appliances manufactured by co-conspirator Zenith. (Tr. 5711-5715; 5640-5642).

Mr. Bernard Freeman, president of Manfree, had previously been in the retail furniture business in San Francisco, through a company called "Barnal". Because of his contacts with local suppliers, he obtained the Philco line from California Electric, the Hotpoint line from Graybar, the Norge line from Lancaster, the Sylvania line from co-conspirator Frank H. Edwards Co., and the Admiral line from Admiral (Tr. 5706-5715).

Manfree came into existence after the prior U.S.E. concessionaire for the major appliance and television lines, United Sales, went into an informal creditors' arrangement. (Tr. 5708, 5712). United Sales had been selling the Norge and Philco lines. (Tr. 5711-5712).

Manfree was specifically requested by California

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<sup>8/</sup> With respect to Philco products, Manfree was able to buy only major appliances for resale from California Electric, and was never able to acquire Philco television sets from that appellee for demonstration purposes on its floor. Philco television sets could only be purchased at Manfree through the expedient of the salesman showing a Philco catalogue to the customer, or the customer requesting a specific Philco model. (Tr. 5755-5758).



Electric not to advertise prices of Philco appliances in the afternoon San Francisco newspaper (Tr. 5725). Appellee Maytag also advised Mr. Freeman not to advertise prices of Maytag appliances (see appellants' offer of proof, Tr. 5783-5784).

Manfree lost the Norge line in October, 1957, and although it consistently thereafter requested to be able to repurchase Norge appliances, it was never able to obtain them. California Electric cancelled Manfree's purchases of Philco major appliances in September, 1958. The Hotpoint line was cancelled in October, 1958. Maytag cancelled Manfree as a dealer in March, 1959. The direct and undisputed evidence as to these cancellations is as follows (see compilation in Pl. Ex. No. 1523):

(i) Cancellation of the Norge line: At the time the Norge line was cancelled in October, 1957, Mr. Mitchell, of co-conspirator Lancaster, told Mr. Freeman that Lancaster had been subjected to pressure from Hale not to sell to Manfree, and had been advised by Hale that unless it ceased selling to appellant, Hale would not buy such products from Lancaster. He stated that the Lancaster organization held a meeting to consider the situation, where it was decided that under such circumstances Lancaster would not sell to Manfree any longer. (Tr. 5808-5809)

(ii) Cancellation of Philco appliances: Mr. Freeman was told by Mr. John Muntain, salesman for appellee California Electric, in September or October, 1958, that California Electric would not sell Philco major appliances to Manfree because of pressure from other retail stores in





San Francisco. (Tr. 5735-5737). After September, 1958, Manfree could not obtain either Philco major appliances or television sets (Pl. Ex. No. 1523; Tr. 5738-5749). California Electric ceased selling major appliances to Manfree, after appellant had advertised Philco major appliances in its advertising "mailers" in March, 1958.

Mr. Freeman was told that Manfree or U.S.E. could not advertise Philco brand merchandise in the newspapers, that appellants would have to "go slow" on sales of Philco goods because of pressure upon this appellee distributor from their other accounts. (Tr. 5721-5726). Mr. Freeman, however, prevailed upon California Electric to permit Manfree to show a picture of Philco major appliances in their "First Anniversary" advertising mailer. This was agreed to, on condition that a picture of Philco's television not be shown in the afternoon San Francisco newspaper. Thus, Pl. Ex. No. 1827-16 shows a picture of a Philco television in Manfree's mailer, but not in the San Francisco Call Bulletin (Pl. Ex. No. 1827-16, compared to Pl. Ex. No. 1827-17). Following this advertising, in the First Anniversary mailer in March, 1958, however, Mr. Muntain of California Electric called on Mr. Freeman at appellant's office and said that he would have to "pull" the Philco line (Tr. 5726-5734). In September, 1958, Mr. Muntain told Mr. Freeman that his company would not sell Philco major appliances to Manfree because of pressure from other stores. (Tr. 5735-5737). (Manfree had purchased \$47,500.00 of Philco appliances from California Electric prior to September, 1958. See Pl. Ex. No. 1523).



(iii) Cancellation of the Hotpoint Line: Co-

conspirator Graybar formally cancelled Manfree's franchise as a Hotpoint dealer by letter dated October 28, 1958. Prior to this date, Manfree had purchased \$100,000.00 of Hotpoint major appliances and television sets. (See Pl. Ex. No. 1523). The letter from Graybar to Manfree states as follows (Pl. Ex. No. 525; Tr. 3071-3072):

"MR. B. FREEMAN  
"Manfree, Inc.  
"2850 Alemany Blvd.  
"San Francisco, Calif.

"Dear Sir:

"Please be advised that it has become necessary for us to invoke Paragraph 8 of the Servicing Dealer Franchise dated January 6, 1958 between your company and Graybar Electric Company, Inc., relating to Hotpoint. Pursuant thereto, this letter herewith serves as notice that Graybar Electric Company, Inc., elects to and hereby does terminate said Servicing Dealer Franchise in its entirety.

"This action is being taken after full consideration of our past relationship. Should there be an opportunity for renewing a sales arrangement with you at some later date, we will value the privilege of discussing the matter with you at that time.

"Very truly yours,

"GRAYBAR ELECTRIC CO., INC.

"/s/ G. L. Call  
"District Manager"

When Mr. Freeman requested an explanation for this conduct, he was told by Mr. W. H. Mayben, District Appliance Sales Manager for Graybar (Tr. 3043), that Graybar would not be able to sell to department stores or other stores as long as it was selling to discount stores (Tr. 5797-5798). Graybar



gave official notice of the cancellation of appellant's franchise to Hotpoint, as required by appellee Hotpoint in its distribution agreements (Pl.Ex. Nos. 536A, 536C).

(iv) Cancellation of the Maytag Line: Manfree also received a formal written cancellation of its franchise as a Maytag dealer from appellee Maytag West Coast. Manfree had sent Maytag West Coast an order for 25 Maytag Washers on April 25, 1959 (Pl. Ex. No. 4164-E). Maytag's letter answer to this request, dated April 30, 1959, was as follows (Pl. Ex. No. 567, Tr. 3330-3331):

"Manfree, Inc.

"2850 Alemany Avenue

• "San Francisco, California

"Gentlemen:

"Our Oakland office has just forwarded an order to us from United Shoppers Exclusive for 25 Maytag automatic washers, Model 142B. I am not familiar with this company and they do not have a Maytag franchise; consequently we are not able to honor their request by filling this order.

"In addition, and for your information, the Maytag 1958 franchise for Manfree, Inc., expired as of March 31, 1959, and as John Mitchel, our Regional Manager explained to your company previous to this expiration date no franchise would be written for your company for the year 1959.

"Sincerely,

"MAYTAG WEST COAST COMPANY

"/s/ R. V. Hahn

"R. V. Hahn

"President"

The uncontradicted evidence shows that Hale was not purchasing Maytag appliances in 1958 (Pl. Ex. Nos. 1524 and 1525). Just prior to the letter of cancellation from Maytag





to Manfree dated April 30, 1959, Hale ordered a carload of Maytag appliances in the approximate sum of \$11,000.00 (Pl. Ex. Nos. 639 and 640). Hale, who did not handle the Maytag line in 1958, thereafter became a leading purchaser of Maytag appliances (Pl. Ex. No. 641, 4161). Hale also became a major advertiser of Maytag appliances after 1958 (Pl. Ex. No. 4153). It received an advertising allowance constituting more than one-third of the purchase order of March, 1958, allowing it to advertise extensively as a Maytag dealer (Pl. Ex. No. 4153; Tr. 1120-1122).

- b. Oral requests by representatives of  
• Manfree for leading brands, during the  
period 1957 to 1960:

Repeated oral requests to vendors were made by Mr. Bernard Freeman and Mr. Arthur Alpine (president of U.S.E. and vice-president of Manfree), for the leading brands of major appliances and television sets for Manfree, without success:

Mr. Freeman had requested permission to purchase Philco television sets from California Electric. However, Manfree could not obtain these television sets as a "regular" dealer (supra, at footnote 8; Tr. 5755-5758).

Mr. Alpine and Mr. Freeman contacted Mr. Bernard Meseth of appellee G.E. in November, 1958, concerning the purchase of G.E. appliances by Manfree. They arranged for a luncheon appointment with him. At the conference, Mr. Alpine requested that Manfree be sold five carloads of G.E. appliances and television sets. Mr. Meseth told Messrs. Alpine and Freeman that he doubted if he could authorize a sale to Manfree



because of "present dealer structureship." This request was reported by Mr. Meseth to higher authority and the demand for five carloads was denied. (Tr. 5837-5843; 5218-5223).

Mr. Freeman attempted to obtain Westinghouse products in 1958 or 1959 from Mr. Bert Newby, Sales Manager, Westinghouse (Tr. 5911). A luncheon meeting was held between Freeman, Alpine and Newby, at which time Mr. Newby stated to Mr. Alpine that Manfree would have to purchase a "million dollars worth of appliances" from Westinghouse a year, since Westinghouse would lose that much business if it sold appliances to Manfree. (Tr. 5915-5920).

Mr. Freeman requested the right to purchase the Zenith television line in 1957, from co-conspirator Basford, but the request was refused with the statement of Basford's sales representative, Mr. Bill Hayward, to Freeman that the line was fair traded, and because of that, it could not be sold to Manfree. (Tr. 5907-5910).

In 1959 or 1960, Mr. Freeman approached the salesman for co-conspirator Lancaster, Mr. Al Schmidt, who was selling Motorola radios for his firm to the U.S.E. radio concessionaire, Camrose, Inc. Mr. Freeman requested the right to purchase the Motorola television line. Mr. Schmidt said he would let Mr. Freeman know, and he reported back later to Freeman that he "couldn't do anything about it". (Tr. 5886-5888).

In either June or July, 1960, Mr. Freeman personally asked the Meyer salesmen representing the Whirlpool and RCA Victor radio lines, Mr. Carlson and Mr. Brown, whether Manfree could not carry these major appliance lines, pointing out



to them in support of the request what an excellent job "Camrose was doing on RCA radios." This request was turned down. (Tr. 5892-5894). The Meyer salesman stated to Mr. Freeman that because of dealer structureship, they were unable to sell RCA televisions to Manfree (Id.).

Representatives of appellee Frigidaire had visited Manfree in 1957 and were asked for a franchise. Frigidaire would not sell its products to Manfree, however. (Pl. Ex. No. 487; Tr. 5825-5829).

c. Appellants attempted to obtain Norge brand major appliances in 1959 from sources in Los Angeles or Chicago, and were unsuccessful:

Mr. Bert Green, the brother-in-law of Mr. Arthur Alpine, was in the business of retailing major appliances in Los Angeles, and testified in this case as a witness for appellants. In 1959, his firm was selling Norge appliances (Tr. 5459-5461).

Mr. Alpine contacted Mr. Green and asked if it would be possible for him to obtain leading-brand major appliances for appellant Manfree through his business contacts in Los Angeles. In this connection, on January 1, 1959, he formally appointed Mr. Green as an agent to purchase major appliances and television sets for Manfree (Pl. Ex. No. 5105).

Mr. Green then contacted representatives of co-conspirator Graybar, distributor for Norge appliances in Southern California (Tr. 2389; 5369-5373). The Division Manager for Graybar at that time was Mr. Ed Bonnet; the Appliance Sales





Manager was Mr. Dale Ash (Pl. Ex. No. 4023; Tr. 5380-5381; 5474-5475); and the salesman who called upon Mr. Green was Mr. Milt Jenkins. (Tr. 5470-5474). Mr. Green placed a carload purchase order with Mr. Jenkins for Norge appliances to be shipped to San Francisco. Mr. Jenkins told Mr. Green that he would have to get approval of the order, and it was thereafter accepted. (Tr. 5470-5474; 5521-5523). The carload subsequently arrived in San Francisco; whereupon a representative of co-conspirator Lancaster in San Francisco called Graybar in Los Angeles to protest the shipment. Mr. Bonnet related this to Mr. Green (Tr. 5512-5513). In April, 1959, a second order for six refrigerators placed by Mr. Green for appellants was honored by Graybar, Los Angeles, and sent to appellant U.S.E. in San Francisco, but this was the last such order that Graybar would honor. (Tr. 5476-5477; 5515-5519).

After Mr. Green was told that he could no longer obtain Norge appliances from Graybar, he requested that appellee Norge Sales in Chicago, Illinois, honor his purchase orders. The written reply to this request, dated May 18, 1959, is contained in Pl.Ex. No. 4035.

Thereafter a meeting was held at the offices of Graybar in Los Angeles in June of 1959, attended by Mr. Green, Mr. Bonnet, and Mr. Ash. At this meeting Mr. Green asked Mr. Bonnet and Mr. Ash why Graybar would not accept the large orders he had sent them on behalf of appellants. Mr. Bonnet stated "I cannot do it." Mr. Green asked him why. Mr. Bonnet stated that Lancaster won't allow it. (Tr. 5508). Mr. Green then requested Mr. Bonnet to call Lancaster's offices in



San Francisco and ask them why Graybar could not sell Norge appliances to appellants. (Tr. 5508). Mr. Bonnet went to another room, called San Francisco, came back and reported the substance of the conversation to Mr. Green, to the effect that Lancaster didn't care whether Graybar, Los Angeles, sold merchandise to Green for U.S.E., but that Lancaster did not want to sell to U.S.E., because it did not want to jeopardize a million dollar business with Broadway-Hale. (Tr. 5509). Mr. Green again requested that Graybar honor his carload purchase orders for appellants, but the request was denied, Mr. Bonnet saying to Mr. Green, "I will let you know next week". (Tr. 5510).

After this meeting, Mr. Green wrote another letter to appellee Norge Sales in Chicago, Illinois, dated June 16, 1959, requesting that his orders for Norge appliances submitted on behalf of appellants be accepted. (Pl. Ex. No. 4034). Norge Sales replied, through Mr. H. P. Bull, that the merchandise requested was "out of stock". (Pl. Ex. No. 4037).

The evidence further showed that after the first transshipment of a carload of Norge appliances through Mr. Green to U.S.E., Lancaster immediately protested to appellee Norge Sales. Mr. Harold P. Bull, Norge Sales vice-president, then called a meeting between the representatives of Lancaster, Graybar, and himself, at the Villa Hotel in San Mateo, California. (Tr. 5369-5382; Pl. Ex. Nos. 4011, 4014, 4023, 4029, and 4019).

Prior to this meeting, Mr. Bull, acting on behalf of Norge Sales, imposed a fine upon Graybar, Los Angeles, for



transshipping the merchandise. (Tr. 5380-5382; 2977-2989; Pl. Ex. Nos. 4011, 4014).

At the meeting at the Villa Hotel, Mr. Gilbert Freeman, Sales Manager of Lancaster, told Mr. Bonnet that he didn't like Graybar shipping Norge products into Lancaster territory. He demanded that Mr. Bonnet stop the transshipments. (Tr. 2592).

Therefore, by April, 1959, Manfree was unable to obtain any of the leading brands of television sets, and virtually none of the leading brands of major household appliances. This situation was never altered during the entire period of time covered by the two complaints.

d. The morning newspapers in San Francisco

refused to accept advertising from U.S.E.:

U.S.E.'s vice-president, Mr. Joseph Mittelman, also was advertising representative of the San Francisco Call Bulletin, the afternoon newspaper published during the period of time involved. (Tr. 2030-2035). During the period 1957 to 1960, he had repeatedly attempted to place U.S.E. advertising in the San Francisco Chronicle, through requests to the Chronicle from the management of the advertising department at the Call Bulletin (Tr. 2056-2062). When these steps were unsuccessful, he then made requests for advertising himself directly to representatives of the Chronicle and Examiner. (Tr. 2062-2092). The advertising copy submitted to the Examiner upon various occasions, but never run by that newspaper, and related correspondence, was admitted against all defendants (Pl. Ex. Nos. 1275A, 1273A, 1274A, 1275B, 1272, 1271; see Tr. 2072-2080).

Pl. Ex. No. 4257 is a copy of an ad requested to be





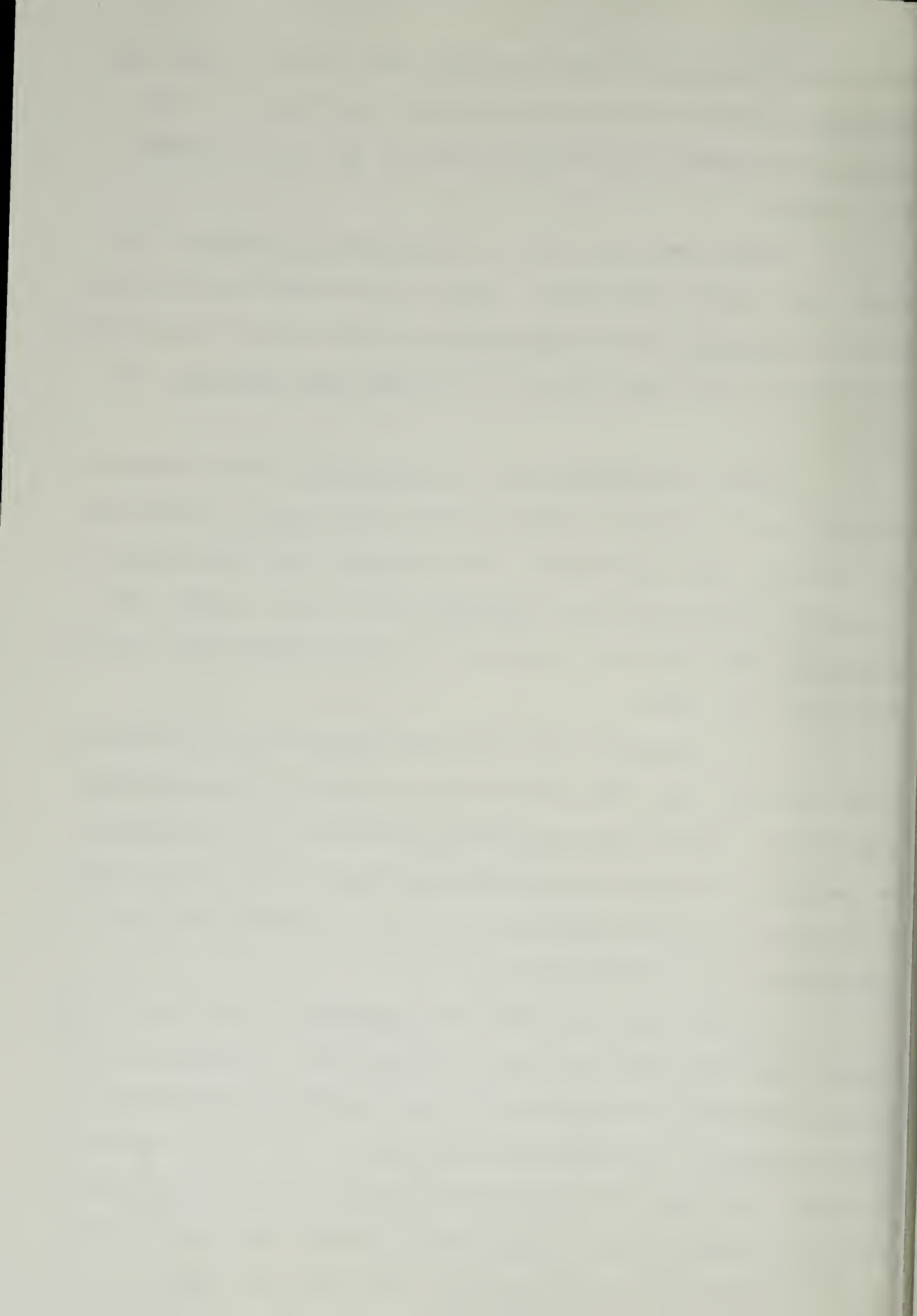
run in the Examiner and the Chronicle for October, 1958; the Examiner refused to accept the copy (Tr. 2067-2071). The Chronicle refused to run the ad shown in Pl. Ex. No. 1278A (Tr. 2083).

These ads were run by the News Call Bulletin, however. (Tr. 2069; 2083-2084). Thus, the evidence showed that both the Examiner and the Chronicle refused to run the advertising copy that had been placed in the News Call Bulletin for U.S.E.

Both the Examiner and the Chronicle later refused to accept U.S.E.'s ad for a sale scheduled for July 4, 1960 (see Pl. Ex. Nos. 1272 and 1277A). This request for advertising was rejected in writing by the Examiner (Pl. Ex. No. 1272); the Chronicle also refused to accept the advertisement (see Pl. Ex. No. 1277A; Tr. 2090).

Mr. Mittelman also testified concerning his conversations with Mr. Ward, the advertising manager of the Chronicle, and with Mr. Gamble, the advertising manager of the Examiner. He requested, through these officers, that U.S.E. advertising be accepted in these newspapers, but his attempts were all unsuccessful (Tr. 2098-2105).

In the fall of 1960, the Examiner's classified advertising representative, Mr. Aro, called on Mr. Mittelman to request that U.S.E. advertise in the classified ad section of that newspaper. Mr. Mittelman said that U.S.E. would be willing to do so, but that Mr. Aro should check into the entire situation concerning U.S.E.'s inability to obtain the usual retail store advertising in the Examiner. Mr. Aro later reported to



Mr. Mittelman that the Examiner could not accept U.S.E. advertising, because of pressure exerted upon the newspaper from the big downtown retail stores such as Hale, Macy's, The Emporium, and Roos/Atkins (Tr. 2105-2123). A memorandum was prepared at the time of the conversation by Mr. Mittelman and placed in evidence as appellee Borg-Warner's Exhibit No. 9024 (Tr. 2164). The Court subsequently struck the exhibit from evidence, as well as Mr. Mittelman's testimony regarding the exhibit (Tr. 6786-6789).

e. The written request of appellants for major appliances and television sets was rejected by appellees and others:

In June and July, 1960, Manfree sent written demands to the vendor appellees and co-conspirators who manufactured or distributed the subject products, that appellant be permitted to purchase such products for resale. The boycott against appellants by these companies was in full force, as Manfree was then completely unable to obtain the leading brands of major appliances and television sets. (See Pl. Ex. Nos. 4280 and 568 (Maytag); 1801, 1803, 1804 (Philco); 3049 (Sylvania); 491 and 492A (Frigidaire); 509 and 510 (G.E.); 1710 (Whirlpool); 4286 (Norge); 537 (Hotpoint); 1759 (Motorola); 1783 (California Electric); 1703 and 1704 (Meyer); 1754, 1756 and 4284 (Lancaster); and 526 (Graybar)). These appellee and co-conspirator vendors continued to refuse to deal with Manfree. The evidence as to these common, continued refusals is summarized as follows:

(1) Norge Appliances and Motorola  
Television Sets:



The letter of Mr. Alpine (Pl. Ex. No. 4286) to appellee Norge Sales was referred to co-conspirator Lancaster by Norge (Pl. Ex. No. 556). This letter contained the personal notes of a representative of Lancaster, stating "Jack - see me - imp" (Tr. 2615-2621). Lancaster refused to send a representative to Manfree, or to otherwise discuss appellant's request. (Tr. 2613-2615; see Pl. Ex. Nos. 1754, 4284, and 1756; Tr. 2613-2615).

Although co-conspirator Motorola referred Mr. Alpine's letter to Lancaster, its local distributor (Pl. Ex. for Id. No. 1760), Mr. Gilbert Freeman of Lancaster could not recollect discussing the request with anyone. (Tr. 2848-2853). This testimony, however, must be considered in conjunction with the fact that the letter from Motorola to Manfree advising appellant of the referral shows a carbon copy was directed to Mr. Gilbert Freeman (Tr. 2851). Lancaster never would sell Motorola brand television sets to Manfree (Tr. 2866-2867).

(2) Philco Appliances and Television Sets:

Appellee California Electric sent its "Key Account" sales representative, Mr. Weaver, to call on Manfree in the summer of 1960. He stated to representatives of appellant that California Electric would not sell Philco appliances to Manfree (Tr. 5778-5779). Mr. Weaver testified that he was shown the letter from appellant requesting Philco appliances (Pl. Ex. No. 1783) by Mr. Valenson, Sales Manager of California Electric, and that he was told to call on appellant by Mr. Valenson (Tr. 3915-3917).

California Electric did not invite Manfree





representatives to its trade show in the spring of 1960, although they were asked to attend an earlier trade show held by appellee in 1958 or 1959 (Tr. 3960-3966).

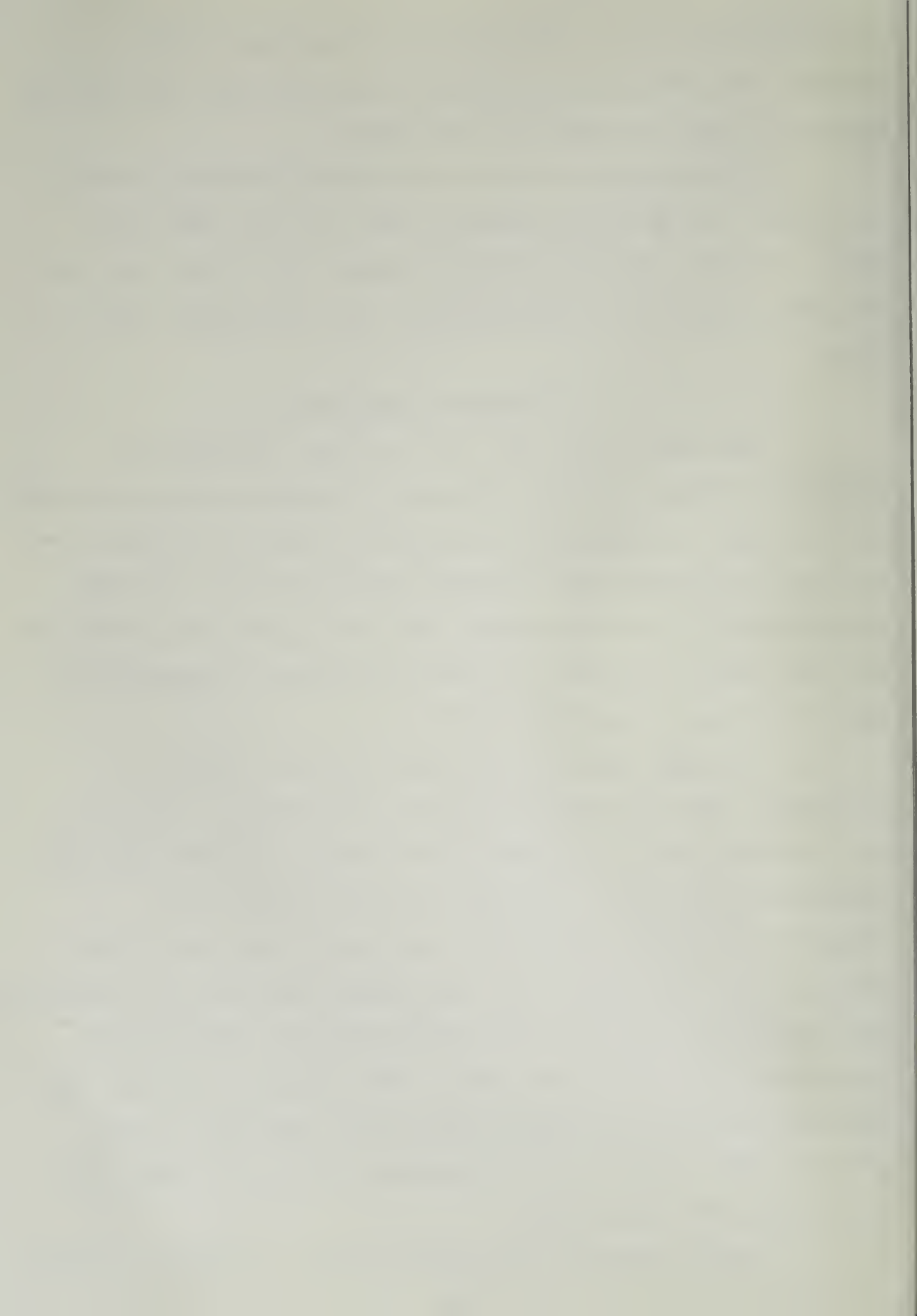
Co-conspirator Philco had referred Manfree's letter sent to it, to California Electric (Pl. Ex. Nos. 1801, 1803, 1804). However, Manfree could not acquire the Philco line from California Electric, or from Philco. (Tr. 3764-3766; 5778-5779).

(3) Frigidaire Appliances:

The 1960 letter (Pl. Ex. No. 491), addressed to Frigidaire Sales, caused Mr. Hamilton, Frigidaire Sales Appliance Sales Manager, to telephone Mr. Bernard Freeman of Manfree. He informed Mr. Freeman that appellee Frigidaire would not sell its products to discount stores, and that it would be a waste of his time and Mr. Freeman's to have a Frigidaire representative call on Manfree. (Tr. 5825-5829).

Mr. John Shaw, San Francisco Division Manager of Frigidaire, did visit Manfree's place of business. He told Mr. Alpine he could do nothing about taking a carload order for Frigidaire appliances. Mr. Shaw refused to take out a Frigidaire franchise application form he had with him in his binder. (Tr. 4314-4316). Mr. Shaw later reported to Mr. Hamilton that Manfree did not have many brands of major appliances or television sets (Pl. Ex. No. 491). The original of Pl. Ex. No. 491 showed erased handwritten notes of Mr. Hamilton. These notes no doubt related to the telephone call by Mr. Hamilton to Mr. Freeman (Tr. 4023-4028).

After receiving its letter request, Frigidaire Division



of General Motors referred Manfree to Frigidaire Sales (Pl. Ex. Nos. 493, 494A); however, Manfree could never obtain Frigidaire major appliances. (Tr. 5829).

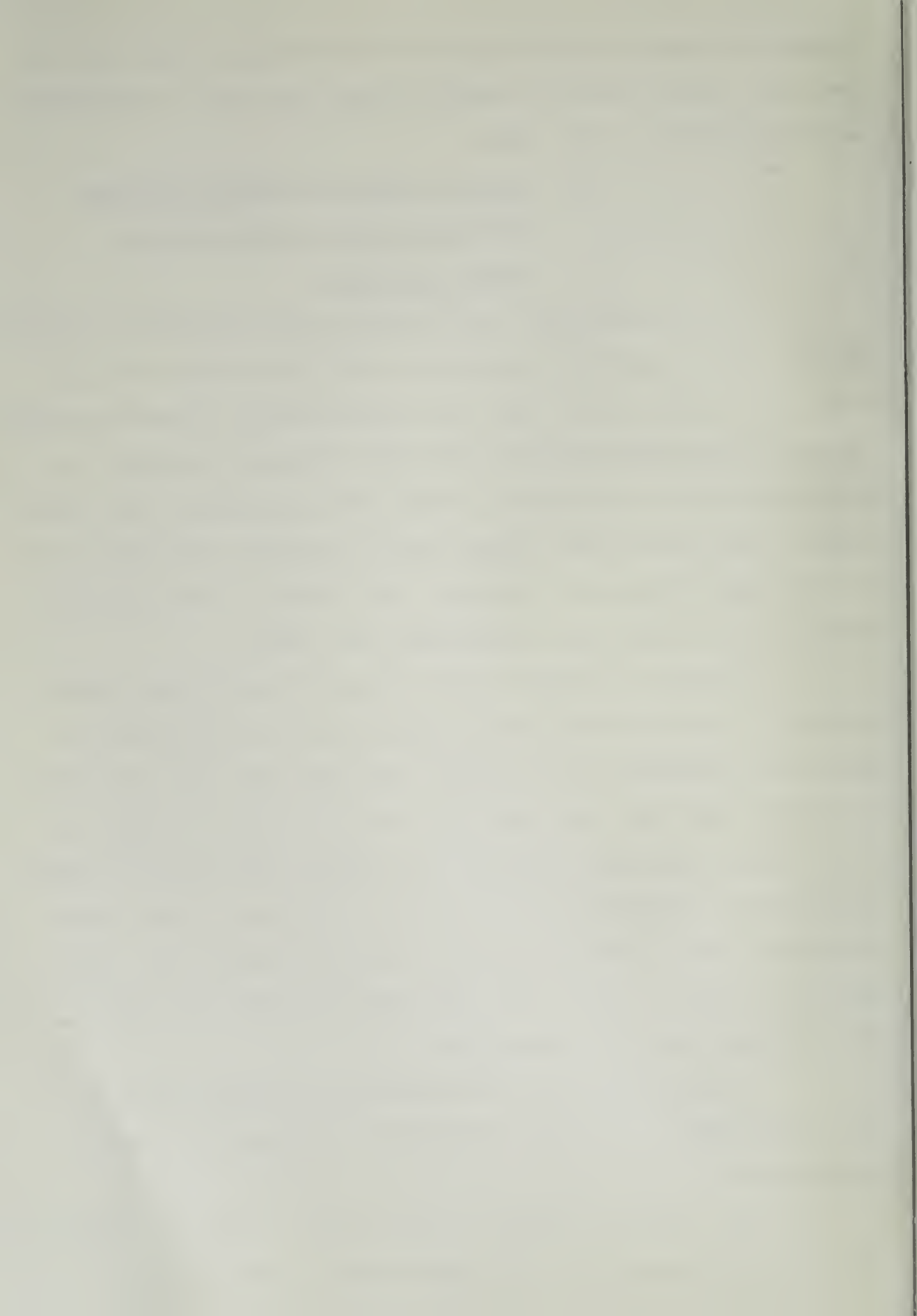
(4) General Electric (Major Appliance Division) Major Appliances and Television Sets:

Mr. William Lau, G.E.'s local sales counselor, visited Manfree after appellee's receipt of the letter dated July 13, 1960 (Pl. Ex. No. 510). Mr. Lau did not bring a franchise blank, "because it was management's decision of General Electric in Burlingame not to franchise a closed door operation" (Tr. 4350-4354). Mr. Lau told Mr. Alpine and Mr. Freeman that there were no openings for new G.E. dealers. (Tr. 4354). G.E. major appliances were never sold to Manfree (Tr. 4354).

Manfree's request to Mr. Bernard Meseth (see above) to buy G.E. products in carload quantities was made known to appellee's President, Mr. Paxton. (Pl. Ex. Nos. 514, 515, 516, 517, 518, 519, 520, 521, and 522). Mr. H. Gough, Manager of G.E.'s Major Appliance Division for Northern California, testified that he determined not to sell to Manfree in 1958, after discussing G.E.'s dealer structure with Mr. Meseth (Tr. 4152-4157; Tr. 4195). Pl. Ex. No. 514 shows the notation "Hales" on the letter (see Tr. 4168-4172).

G.E. did not sell to closed door discount stores (Tr. 5301-5302). Mr. Gough objected to this type of retail operation (Tr. 4193-4194).

Mr. Alpine's letter to G.E.'s home office in Louisville Kentucky, was referred to its Burlingame regional office



(Pl. Ex. Nos. 509, 512, 511, 513); however, Manfree could never obtain the G.E. major appliance line (Tr. 5843).

(5) General Electric - Hotpoint Appliances:

Appellee Hotpoint did not respond to appellant's letter of June 24, 1960 (Pl. Ex. No. 537). (Tr. 5801).

Hotpoint's Northern California distributor, co-conspirator Graybar, sent a representative, Mr. William Mayben, to call on Manfree (see Pl. Ex. No. 526). Mr. Mayben said that he had called to explain "company policy", and requested to see Mr. Alpine, who was not available. Mr. Mayben stated to other representatives of appellants that Graybar could not sell the Hotpoint line to Manfree (Tr. 5573-5581).

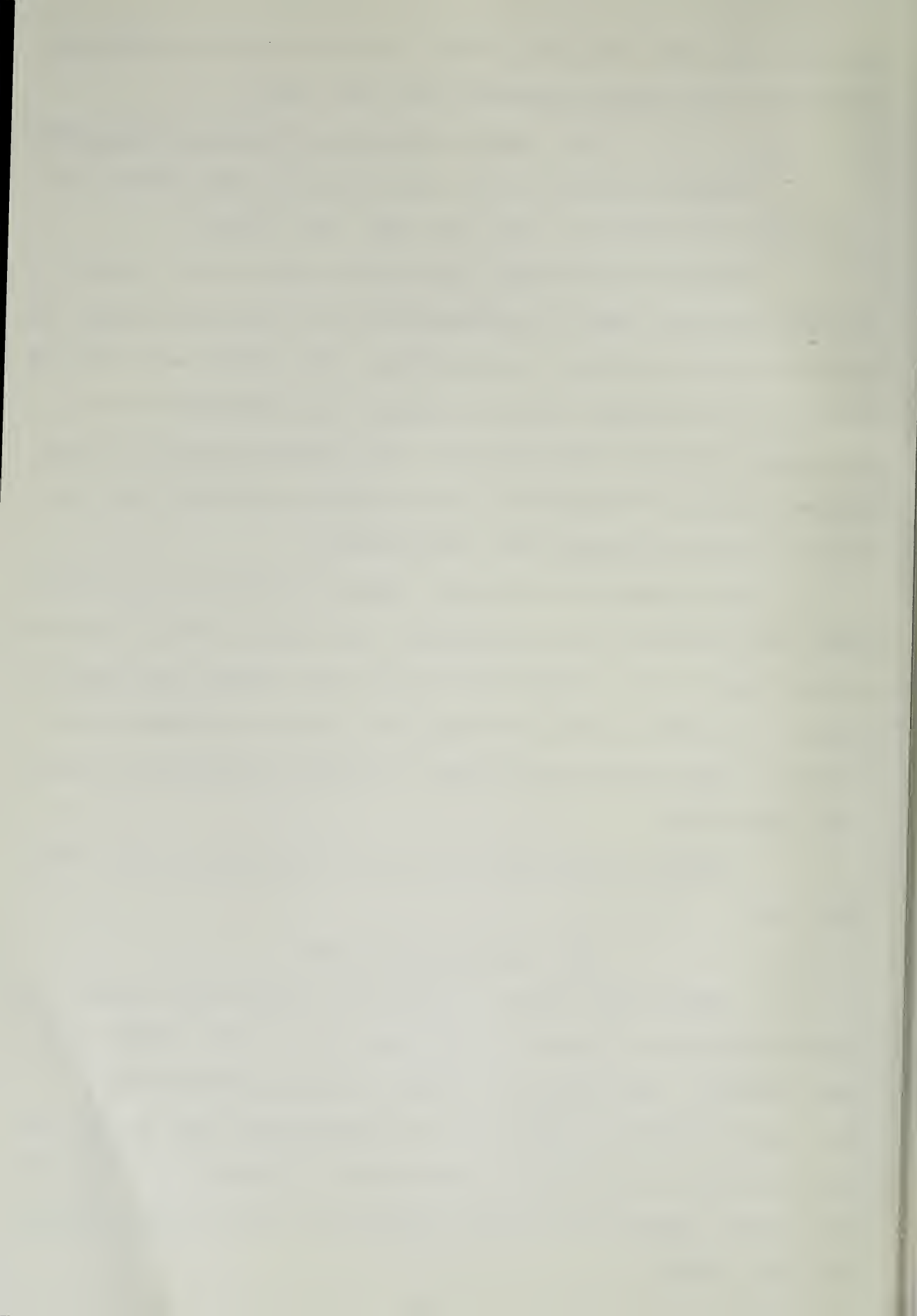
Mr. Mayben had told Mr. Freeman of Manfree in October, 1958, that Graybar was instituting a new sales policy, and would not be able to sell to discount stores any longer; and that he wouldn't be able to sell to department stores or other retail stores as long as he sold Hotpoint products to discount stores (Tr. 5797-5798).

Manfree could not buy Hotpoint appliances after 1958 (Tr. 5800).

(6) Maytag Appliances:

Appellant's letter to appellee Maytag West Coast, the Maytag distributor for the local area (Pl. Ex. No. 4280), was not answered. The Regional Manager of Maytag West Coast, Mr. John L. Mitchel, admitted in his testimony that he made the decision not to sell Maytag appliances to Manfree, in 1959 (Tr. 3351-3352). Maytag West Coast refused to sell to Manfree after 1959 (Tr. 3352).





Maytag did not respond to Mr. Alpine's letter to its National Sales Manager, of June 24, 1960 (Pl. Ex. No. 568); and Manfree could not obtain the Maytag line after April, 1959 (Tr. 5788).

(7) R.C.A. Television Sets:

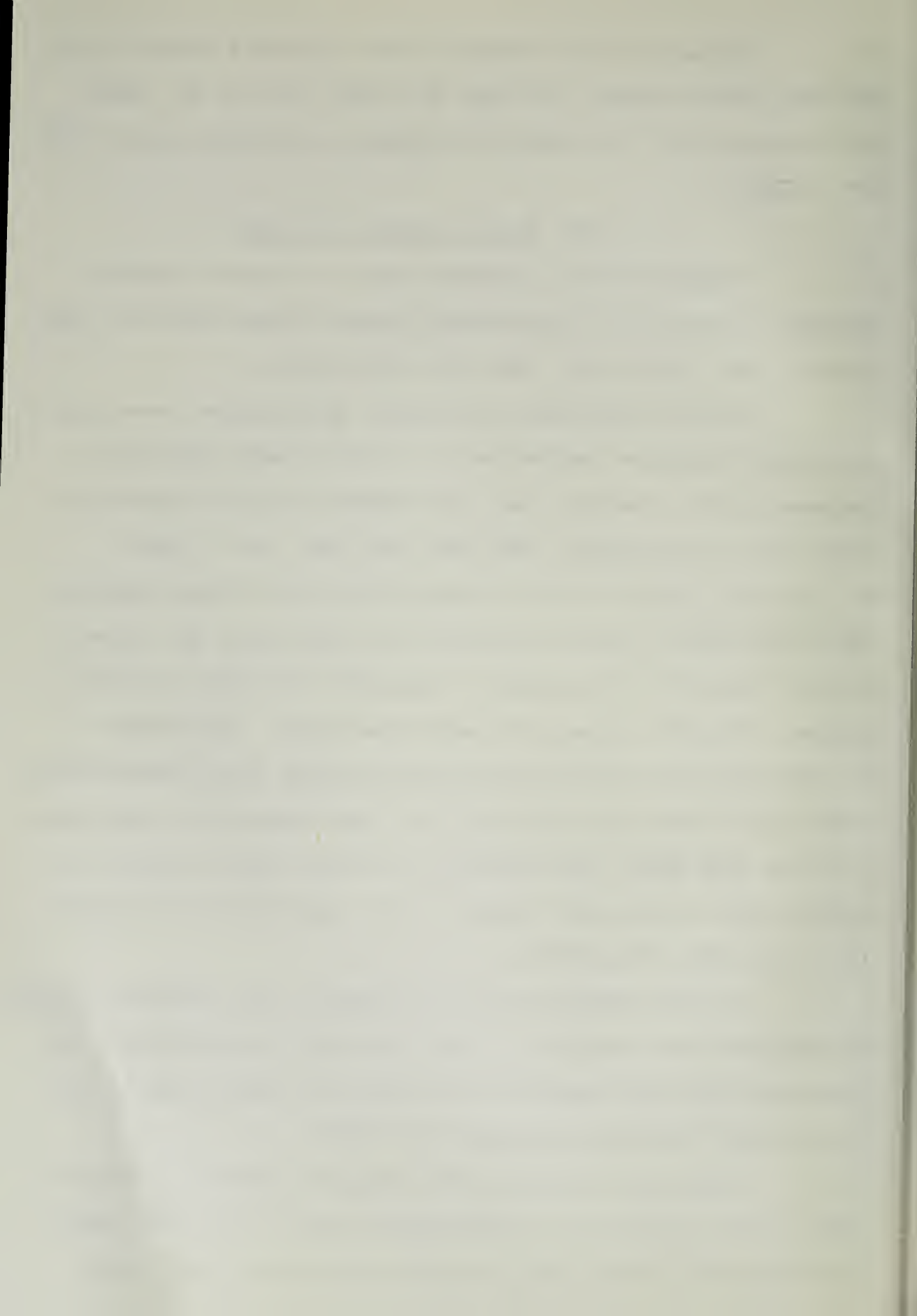
Appellee R.C.A. asserted that it did not receive Manfree's letter to it requesting product, dated July 13, 1960 (see Pl. Ex. for Id. No. 1691; Tr. 6114-6117).

R.C.A.'s Northern California distributor, co-conspirator Meyer, sent an invitation to U.S.E.'s small appliance concessionaire, Camrose, Inc., to attend an R.C.A.-sponsored trade show in September, 1960 (Pl. Ex. Nos. 1707, 1708).

Mr. Erickson, Meyer's sales manager for R.C.A.-brand products (Tr. 4847-4849), admitted that at the trade show, Mr. Marvin Boyd of Manfree, who attended, requested the right to order a carload of R.C.A. television sets from Meyer. Only after Mr. Erickson had stated that he could accept such orders solely from R.C.A.-franchised dealers, Mr. Boyd requested to see someone else from Meyer with authority to take such an order for Manfree; but no one else talked to Mr. Boyd about his request (Tr. 4885-4888; 4911-4915).

At Mr. Bernard Freeman's request, Mr. Erickson visited the Manfree store premises. When the right to purchase R.C.A. television sets was requested, he told Mr. Arthur Alpine that he could not franchise Manfree (Tr. 4918).

Following receipt of Mr. Alpine's letter of June 24, 1960, to the local R.C.A. distributor (see Pl. Ex. No. 1703), the officers of Meyer held a meeting concerning the letter



request. It was decided not to sell R.C.A. televisions to Manfree, but to sell R.C.A. radios to another concessionaire of U.S.E., Camrose, Inc. (Tr. 1217-1220). Those present were directed to report any further requests by appellants for television sets to Meyer's Vice President and General Manager, Mr. Richard Sanford (Tr. 1197).

(8) R.C.A. Whirlpool Appliances:

Appellee Whirlpool responded to Mr. Alpine's letter request to it of June 24, 1960 by referring him to its San Francisco distributor, co-conspirator Meyer (see Pl. Ex. Nos. 1710, 1711, 1714, and 1715). Whirlpool never sold appliances to appellant Manfree (Tr. 5895).

Mr. Sanford, of co-conspirator Meyer (see above), testified that he received Mr. Alpine's letter of July 25, 1960, addressed to that distributor requesting Whirlpool products (see Pl. Ex. No. 1705). Mr. Sanford gave instructions to the Whirlpool product division of Meyer not to take any action in response to the letter (Tr. 1290-1291).

Mr. Bert Carlson, a Meyer sales representative for the Whirlpool line (Tr. 4986), testified that he received requests from representatives of Manfree for Whirlpool products, and in each instance informed the other person that Meyer was not interested in selling to Manfree at that time (Tr. 4993).

Meyer never sold Whirlpool appliances to Manfree, until August, 1964 (Tr. 4994).

(9) Westinghouse Appliances and  
Television Sets:

Mr. Jack Hangauer, District Manager, Westinghouse



Appliance Sales Corporation ("W.A.S."), testified that he was the successor to Mr. T. B. Newby, who held the position from 1958 or 1959 until April, 1962 (Tr. 6128-6129). Hangauer described W.A.S. as a division of Westinghouse.

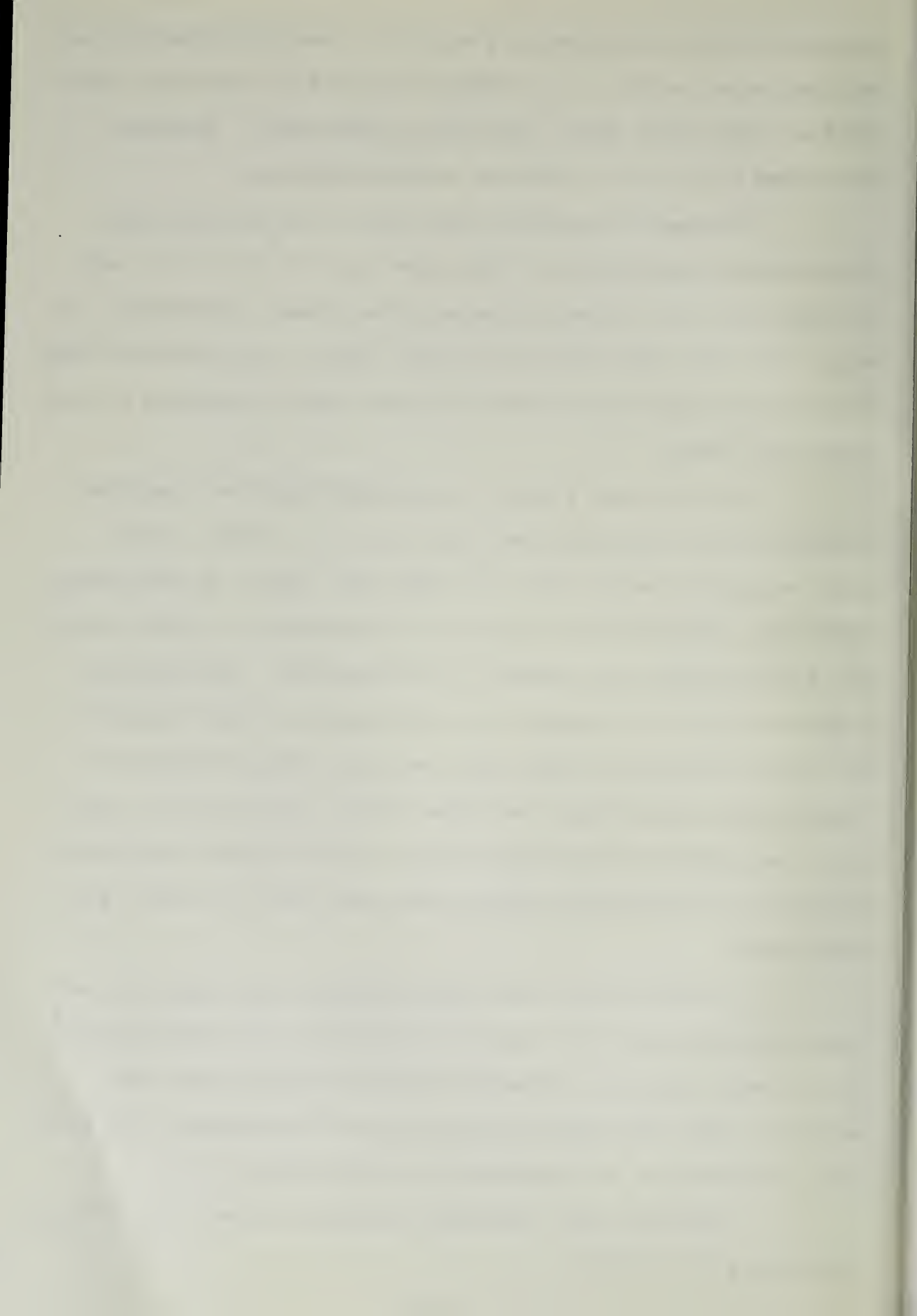
Hangauer testified that W.A.S. was selling major Westinghouse appliances to "Bay Mart" and "G.E.M.C.O.", who he identified as discount stores in San Jose, California, in May, 1962 (Tr. 6146; see Pl. Ex. No. 691). He understood that Westinghouse appliances were not being sold to Manfree at that time (Tr. 6147).

Mr. Bernard Freeman of appellant Manfree testified concerning his conversations with Mr. T. B. Newby, W.A.S. sales manager (see Pl. Ex. No. 1808; Tr. 5916), in the period 1958-1959, at New Joe's Restaurant in Westlake, San Francisco. Mr. Arthur Alpine was present at the meeting. When Alpine requested the Westinghouse line for Manfree, Newby replied by asking if Manfree could buy a million dollars worth of Westinghouse appliances; and when Alpine replied "no", said that Westinghouse would lose a local account worth that much business if Westinghouse appliances were sold at U.S.E. (Tr. 5910-5920).

In the period 1957-1964, Freeman also spoke on several occasions with Erik Skytte, a salesman for Westinghouse, and on each instance requested the Westinghouse line for Manfree. Each time Skytte replied that Westinghouse would not sell its products to appellant (Tr. 5920-5922).

Manfree never obtained the Westinghouse line of major appliances (Tr. 5920).





(10) Zenith Brand Television Sets:

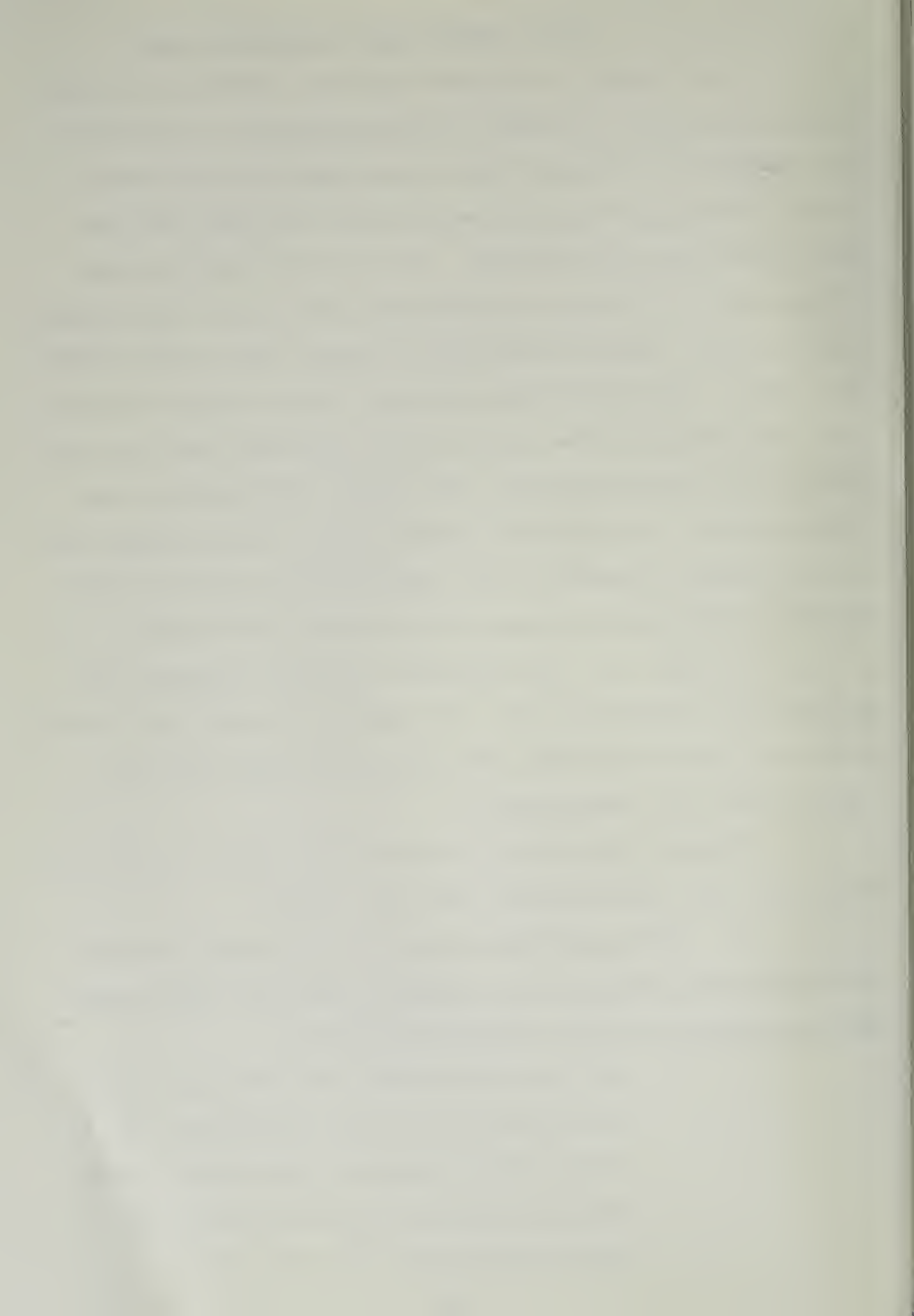
Mr. Freeman of Manfree testified concerning his conversations with Mr. J. Forni, a vice-president of co-conspirator Basford in charge of radio, phonograph and television sales, concerning obtaining Zenith-brand products from that local distributor for Manfree. In conversations with Forni held in 1962, the latter told Freeman that U.S.E. could obtain Zenith radios, because they were no longer being "fair-traded" (Tr. 5899). He admitted that discount stores located in San Jose were being provided major Zenith appliances such as television sets and phonographs, even though such products were "fair-traded", but said that Basford would not make these products available to Manfree until other discount stores in San Francisco were selling these appliances (Tr. 5896-5900).

In 1957, Mr. Bill Hayward, a Basford salesman for Zenith-brand television sets, had told Mr. Freeman that Basford could not let Manfree have such products because they were "fair-traded" (Tr. 5907-5910).

Manfree was unable to obtain major Zenith-brand appliances from 1957 until August, 1964 (Tr. 5910).

5. Joint and Collaborative Actions Among Retailer Co-Conspirators Lachman Bros., Redlick, Sterling, Macy's and Hale were Established by Substantial Evidence:

- a. The large department and furniture stores long-established in San Francisco, and having major appliance departments, demonstrated practices of doing business in close association with each other:

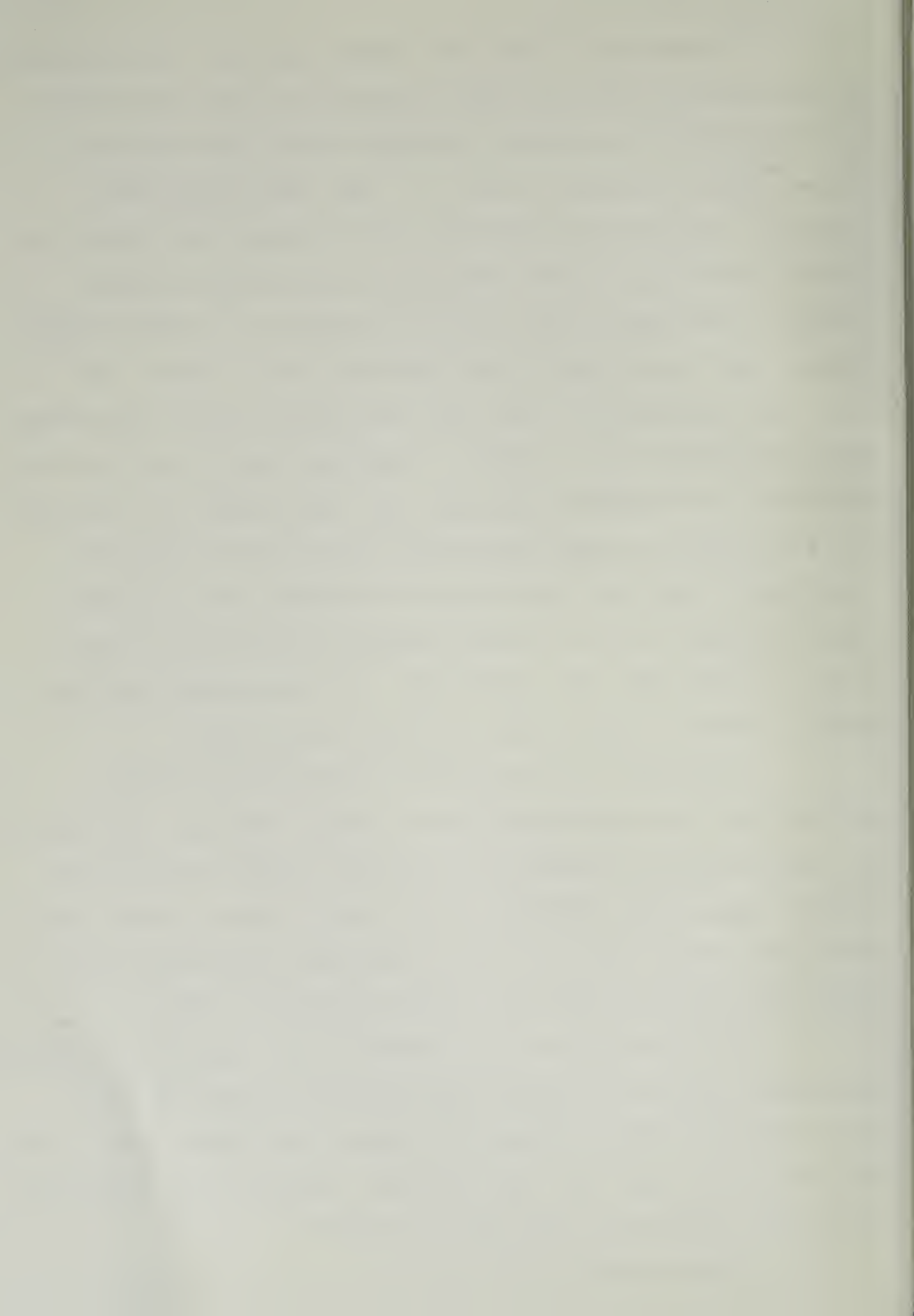


Commencing in 1957, Mr. Wesley Lachman, vice-president of co-conspirator Lachman Bros., became the first chairman of the Home Furnishing Advisory Committee of the San Francisco Better Business Bureau ("B.B.B."). (Tr. 1573; 2317-2322). Fearing a crack-down by the State of California with respect to bedding labelling, the San Francisco-area furniture stores formed a committee in the B.B.B. to establish a uniform "advertising code" to be used by San Francisco retail stores (Tr. 2317-2322; 1573-1577). This code was established by representatives of Lachman Bros., Redlick, Sterling, Macy's, The Emporium, and other San Francisco retailers (Tr. 1583-1585). It included the advertising of major appliances and television sets (Tr. 1587-1589). The Hale representative attended some of these group meetings in 1957; and the committee continued to meet until at least 1960 (Tr. 1150-1152). Co-conspirator Sterling did not become a member until 1959 (Tr. 1739-1743).

The nature of this overall relationship between the retailer co-conspirators Lachman Bros., Sterling, and Redlick is demonstrated by evidence of reciprocal visits between each other's stores (Tr. 2244-2250; 2321-2325). Retail prices were discussed between Mr. W. O. Saxe, president of Sterling, and other San Francisco furniture store owners (Tr. 2456).

Co-conspirators Hale, Lachman Bros., Macy's and Redlick followed a practice of making "accommodation sales" of major appliances and other products, to assist each other. (See Pl. Ex. Nos. 434, 435, 444, 445, 448, 450(A,B), 451(A,B); Tr. 1035-1036; 1310-1311; 1508-1510; 1512-1513; 1599-1600.)

Representatives of co-conspirators Hale, Lachman Bros.,



Frigidaire, Graybar, Basford, Meyer, Sylvania, and Westinghouse, and appellees G.E. and Hotpoint, also met each other at meetings of the Northern California Electrical Bureau (N.C.E.B.). (Tr. 3125-3129; 3136-3141). The N.C.E.B. also had a particular San Francisco unit of which Hale, Lachman Bros., Sterling, Redlick, Macy's, G.E., Frigidaire, Graybar, and Lancaster were members (Tr. 1520, 1934-1935, 1950).

Retailers Lachman Bros., Redlick and Sterling were also members of the Retail Furniture Dealers' Association of California, their officers were officers of this association, and their representatives met each other at its meetings (Tr. 2292-2298; 2444-2446).

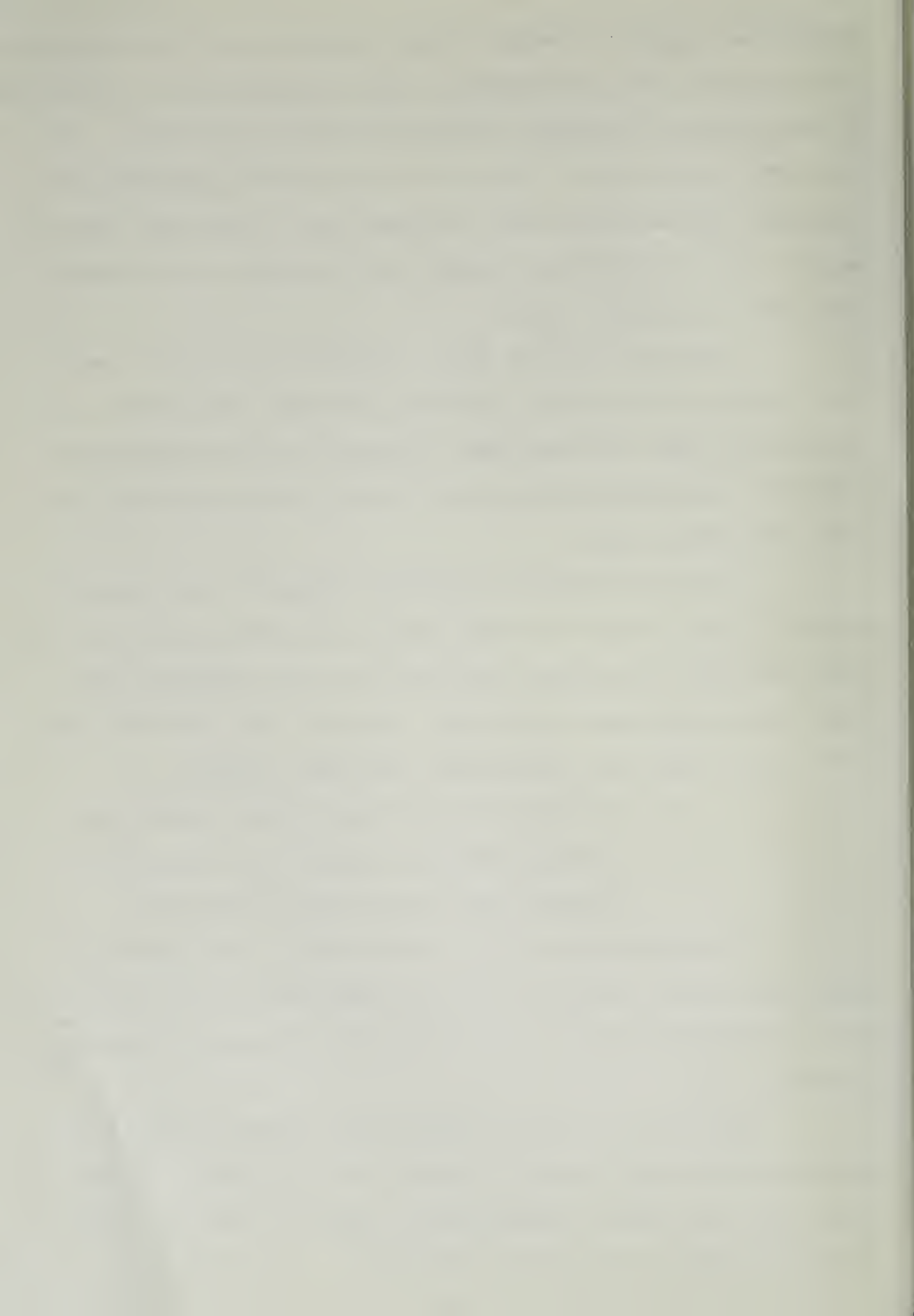
The San Francisco retailers "shopped" each other's stores to keep an eye on retail prices of similar products, and some admittedly discussed retail prices upon occasions when their representatives would meet. (See Tr. 567, 897-902, 1311-1313, 1671, 1675-1678, 2244-2250, 2281-2282, 2456.)

- b. Evidence of retailers' joint refusal to purchase Maytag products at a time when Manfree was selling Maytag products:

Co-conspirators Hale, Lachman Bros., and Sterling would not handle the Maytag line of appliances until after the point in 1959 when appellant Manfree had its Maytag franchise revoked.

Mr. John T. Mitchel became the regional manager for appellee Maytag West Coast in 1959. At that time he visited Hale (Tr. 3316-3324), Lachman Bros., Sterling, and other San Francisco retail stores (Tr. 3319-3324). Hale received a





Maytag franchise in March, 1959 (Pl. Ex. No. 313); and Sterling in October, 1959 (Pl. Ex. No. 318). Mr. Mitchel, early in 1959, had found Sterling's Maytag purchases to be disappointing (Tr. 3335-3336). He likewise found the purchases of Maytag products by Lachman Bros. to be below that which he felt desirable (Tr. 3336-3337). Lachman Bros. was franchised by Maytag in 1960; until then its purchases of Maytag products had been limited (Tr. 3336-3337).

c. Evidence of retailers' joint refusal to purchase Hotpoint-brand appliances at a time when Manfree was selling these products:

During the period of 1957 to 1958, when appellant Manfree was selling Hotpoint-brand major appliances, co-conspirators Hale, Lachman Bros. and Sterling were not purchasing the Hotpoint line.

Mr. Mayben became the District Appliance Manager, Central Pacific District, for co-conspirator Graybar, the local Hotpoint distributor, in April, 1959. He then called on Mr. Tobin of Sterling to find out why that store was not buying Hotpoint products (Tr. 3063-3065). He also called on Mr. Laird of Lachman Bros. for the same reason (Id.); and in calling on Macy's, requested representatives of that store to increase its purchases of Hotpoint (Id.)

Immediately after Manfree was cancelled as a Hotpoint dealer in the fall of 1958, Mr. Mayben instituted a strict advertising policy whereby Graybar established "suggested" price schedules for Hotpoint products, and which conditioned the granting of co-operative advertising funds to retailers on their



advertising of Hotpoint products at the stated Graybar suggested retail price (see Pl. Ex. Nos. 339, 340; Tr. 6089-6095).

Appellants established that just prior to Manfree's removal as a Hotpoint dealer, co-conspirator Graybar announced to the representatives of the key retail accounts of Hotpoint in San Francisco, at a breakfast meeting at the Palace Hotel, that Graybar had changed its policy concerning dealer outlets, and would no longer service or franchise discount stores (Tr. 6120-6125). Thereafter, and after Manfree was removed as a Hotpoint dealer, co-conspirators Sterling, Hale, and Lachman Bros. became large purchasers of Hotpoint-brand appliances (Pl. Ex. No. 4267).

Hotpoint, through its distributor, Graybar, also instituted the merchandising gimmick of the so-called "back-door sale" by arrangement with co-conspirator Sterling, in 1959. (See Tr. 1716-1732; 2238-2240). The "back-door sale" was a special sale, held usually on a Sunday, which required tickets for admittance. It was not open to the general public, and the sale prices were based upon the distributor's suggested list prices (Tr. 1732-1734; 2233-2240; 1626-1627. Announcements of the sale were mailed to a large number of potential customers, which included a price brochure and admission tickets. These announcements, called "mailers", were paid for by the advertising funds provided by the factories making the products involved, administered through the respective local distributors. (Tr. 2452-2455; see Pl. Ex. Nos. 455 and 212. See, also, Tr. 1725-1726, 1731-1732; 1613-1625; 2237-2240; 4119-4127; 4299-4301; 4998; and 5258-5261.)



The evidence also showed that the retailer co-conspirators would ask their local distributors which San Francisco retail stores were handling the particular line of major appliance, before the retailer would agree to stock the product (Tr. 1667-1668; 1012-1014; 2342-2346). Redlick, it was shown, complained to a California Electric salesman in 1962 that "Alec's", a discount store in the Westlake district of San Francisco, was requesting the Philco-brand appliance line (Pl. Ex. No. 483). Macy's and Lachman Bros. also registered complaints about "price-cutting" on G.E. -brand products by other San Francisco retailers (Tr. 4370). Macy's refused to compete on retail prices for Westinghouse-brand appliances (Tr. 6156-6157).

d. R.C.A.-brand television, and R.C.A.-Whirlpool, Frigidaire, and G.E.-brand appliances were made available to other San Francisco retailers, but were never made available to Manfree:

It was stipulated that Meyer always refused to sell R.C.A.-brand televisions to Manfree. The evidence showed that Manfree was unable to buy the Whirlpool line. See Tr. 5608-5609; 4921; 4990-4994.

Mr. Erickson, salesman for Meyer, testified that the San Francisco retailers to whom his company sold such products generally advertised these products at the suggested list price (Tr.4975). He further testified that he would not recommend selling R.C.A. Victor television sets to Manfree, because he believed this would result in a de-emphasis of this line by Meyer's other San Francisco retail accounts which were not discount stores (Tr. 4895-4911).



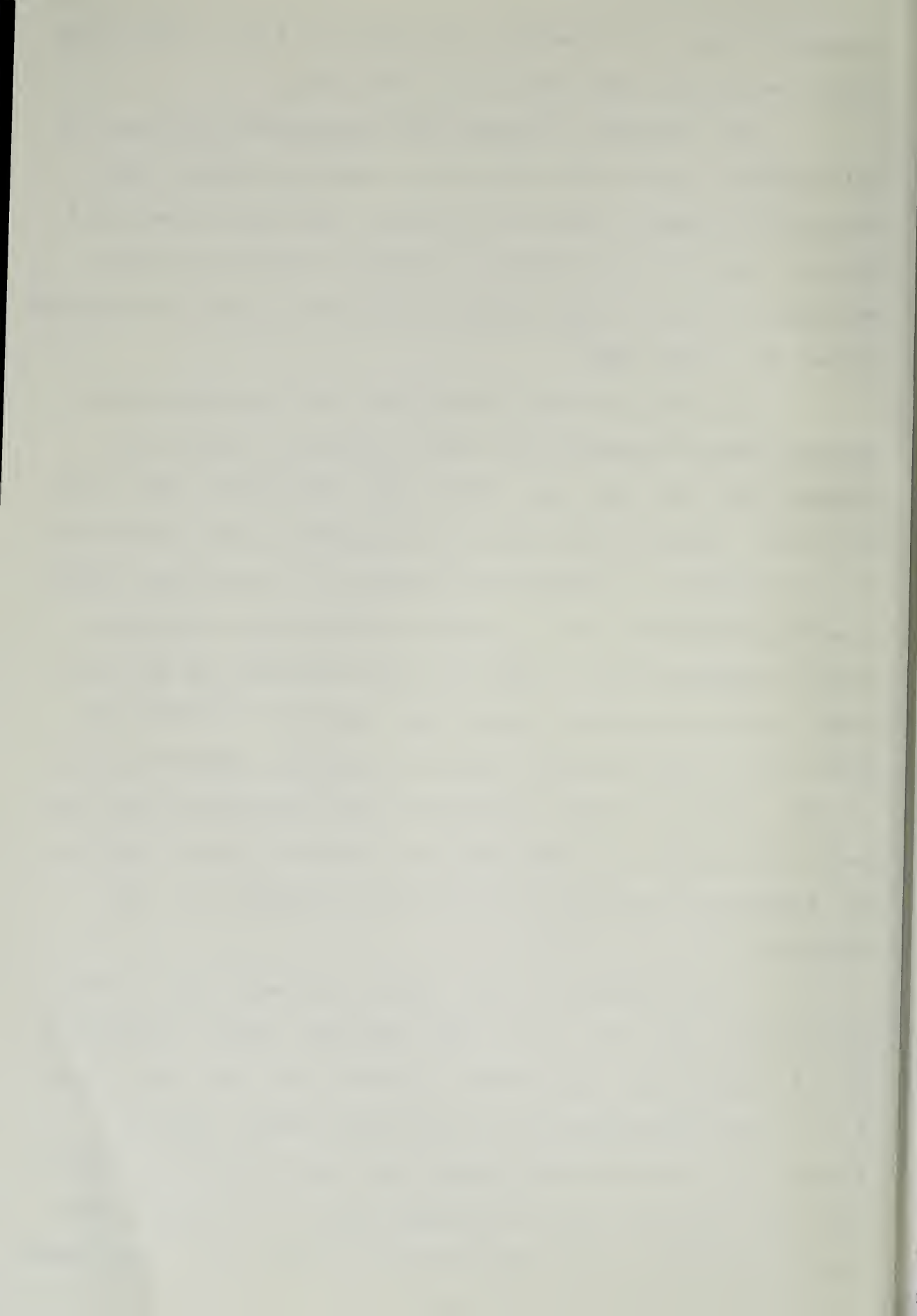


request of Hale, to determine the source of R.C.A.-brand television sets being sold there (Tr. 1017-1022).

Mr. Sanford, a witness with extensive experience in selling major appliances, both for a retailer (Hale), and a distributor (Meyer) (see Tr. 504-510), testified he believed that in order to have downtown retailers continue to carry Whirlpool products, Meyer would not be able to sell to discount stores (Tr. 1288-1289).

In 1957, the key advertisers for Frigidaire-brand products were co-conspirators Hale, Sterling, Redlick and Lachman Bros. (Pl. Ex. Nos. 2058, 2060, 2061-2064, 2068, 2070, and 2059). Hale did not carry the Frigidaire line after 1959 (Tr. 4216-4217). A Frigidaire salesman, Mr. John Shaw, testified that Frigidaire was in need of downtown San Francisco retail representation in 1960; and that Manfree was not solicited, because Frigidaire wanted the "downtown" outlets (Tr. 4305-4307). Mr. Hamilton, another Frigidaire representative, in 1960 told Mr. Freeman of Manfree that Frigidaire would not sell its products to a San Francisco discount store, and that Mr. Freeman was wasting his time making requests for the Frigidaire line (Tr. 5828).

Co-conspirators Hale, Macy's, Lachman Bros., Redlick and Sterling were the largest San Francisco retail purchasers of G.E.-brand major appliances. (See Pl. Ex. Nos. 148, 149). A G.E. sales representative, Mr. Bernard Meseth, told Mr. Freeman at a time when the latter was requesting G.E. products that G.E. could not sell to Manfree because of "present dealership structure" in San Francisco (Tr. 5842-5845). Mr. Meseth

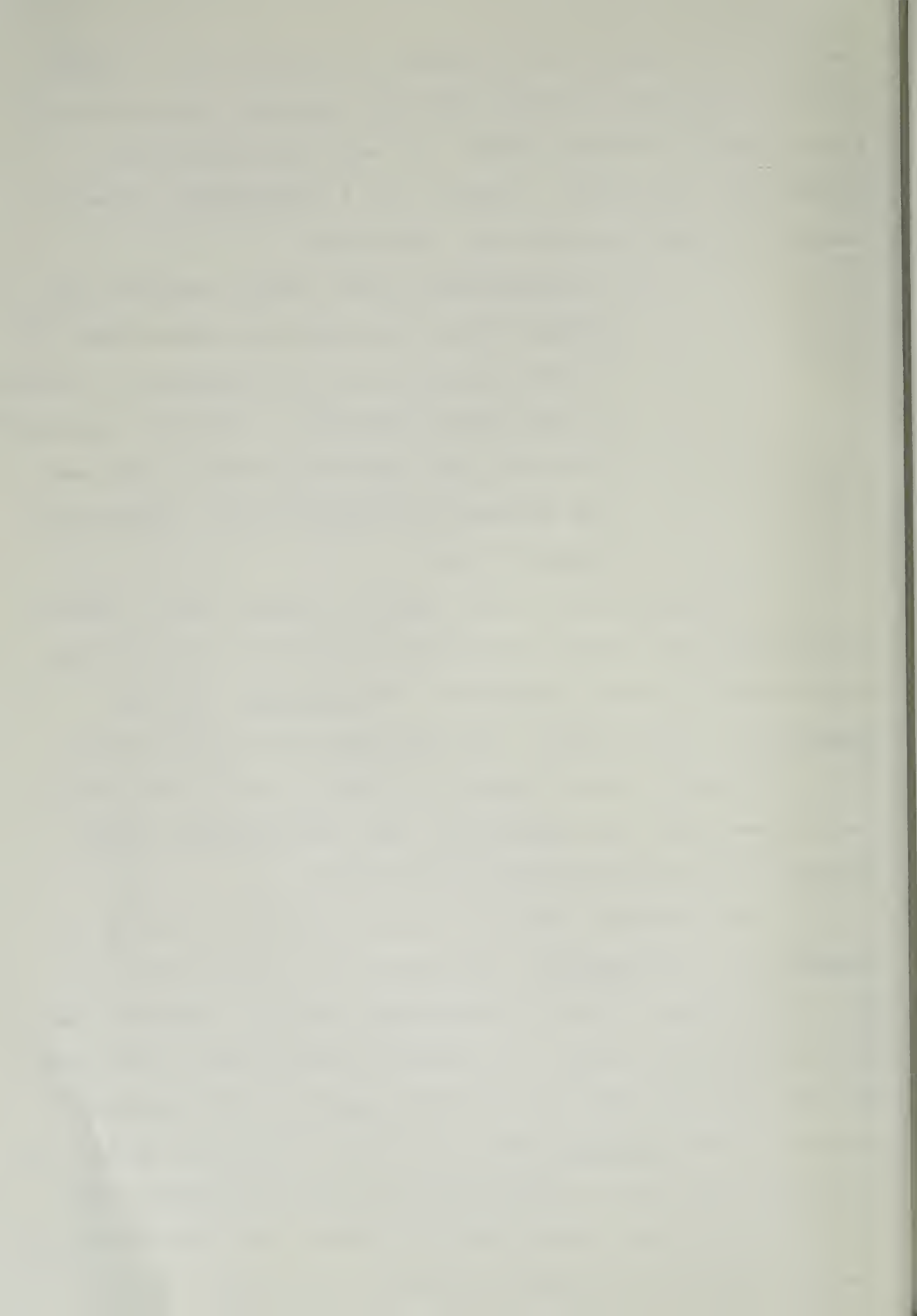


testified that there was an element of risk to G.E. in losing its major appliance business with San Francisco department and large furniture stores, should G.E. sell its products to Manfree (Tr. 5264-5265). Manfree, as a consequence, never obtained G.E.-brand products (Tr. 5843-5844).

e. Co-conspirators Hale, Macy's, Redlick and Lachman Bros. were extensive advertisers in the San Francisco morning newspapers, but not in the evening newspaper. Sterling requested a meeting with representatives of the evening newspaper to discuss U.S.E. advertising carried by it:

Co-conspirators Hale, Macy's, Lachman Bros., Redlick and Sterling were among the principal advertisers in the two San Francisco morning newspapers, the Chronicle, and the Examiner (Tr. 2305-2309). The Chronicle advertising manager had a discussion with an officer of Macy's, soliciting the latter's views about the possibility that the Chronicle would accept U.S.E. advertising (Tr. 6878-6880).

In December, 1960, Mr. Aro, classified advertising salesman for the Examiner, solicited U.S.E. advertising from Mr. J. Mittelman, U.S.E.'s advertising manager. However, after taking appellant's copy, Aro called Mittelman back to say that the ads would not even be run by his paper in the classified section, as the Examiner felt U.S.E. was a "discount house" and its policy was not to accept discount store advertising; that ads from such stores would directly compete with advertising of regular downtown San Francisco stores such as Hale, Macy's,



The Emporium, and Roos/Atkins, who did not want the Examiner to run U.S.E.'s advertising. Aro also told Mittelman that he had checked all this out with people senior to him in the newspaper (Tr. 2105-2123; Borg-Warner Ex. No. 9024).

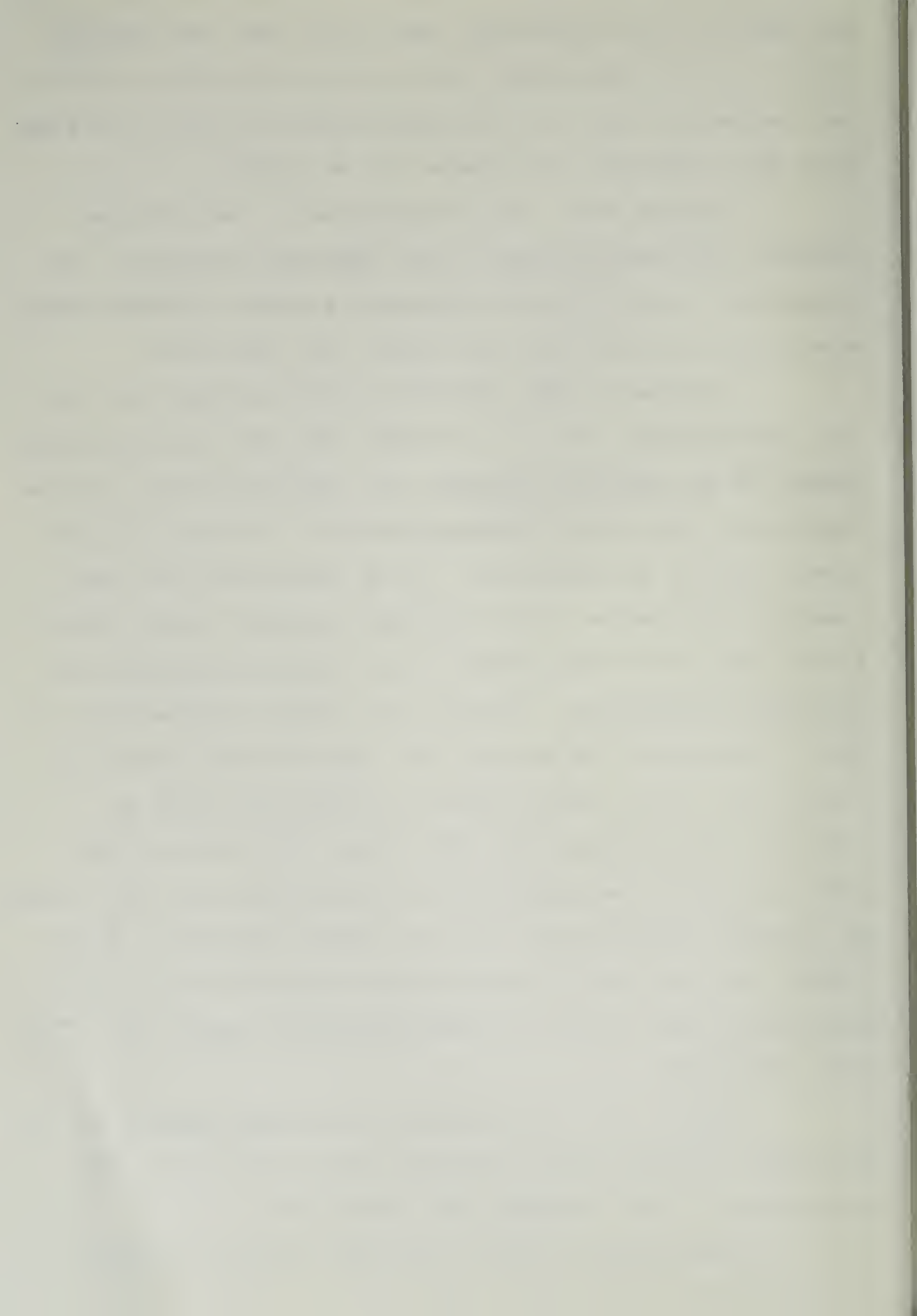
Lachman Bros. did not advertise in the afternoon newspaper, The Call Bulletin (later News Call Bulletin), for the specific reason that the newspaper accepted discount store advertising, such as that from U.S.E. (Tr. 2035-2054).

On June 8, 1960, Sterling's vice-president and general sales manager, Mr. R. E. Schreck, met with the advertising manager of the News Call Bulletin, Mr. Wallace Brooks, and the newspaper's advertising representative, Mr. Al Leary, at the Olympic Club in San Francisco. U.S.E. advertising was discussed at the meeting, which followed a protest by Mr. Schreck to Mr. Leary concerning certain U.S.E. advertising carried by the News Call Bulletin. Although Mr. Schreck said he could recall no details of the meeting (Tr. 1763-1768) Mr. Leary admitted that U.S.E. was the subject of discussion with Mr. Schreck at the luncheon (Tr. 5689-5700). This meeting also took place at a time approximating that during which Mr. Schreck, Mr. Lachman (Lachman Bros.) and Mr. Redlick (Redlick), among others, were meeting in connection with establishing a uniform advertising code for San Francisco retailers (supra) (Tr. 2327-2333, 1761-1763).

Redlick did not advertise in the Call Bulletin or its successor newspaper, during 1957 and 1958, while U.S.E. was advertising in that newspaper (Tr. 2305-2309).

Advertising by Hale in the Call Bulletin dropped





substantially in amount, during 1959. (Pl. Ex. No. 4343; Tr. 331-333).

- f. Evidence of common distributor-manufacturer action toward another San Francisco membership discount store during the applicable period:

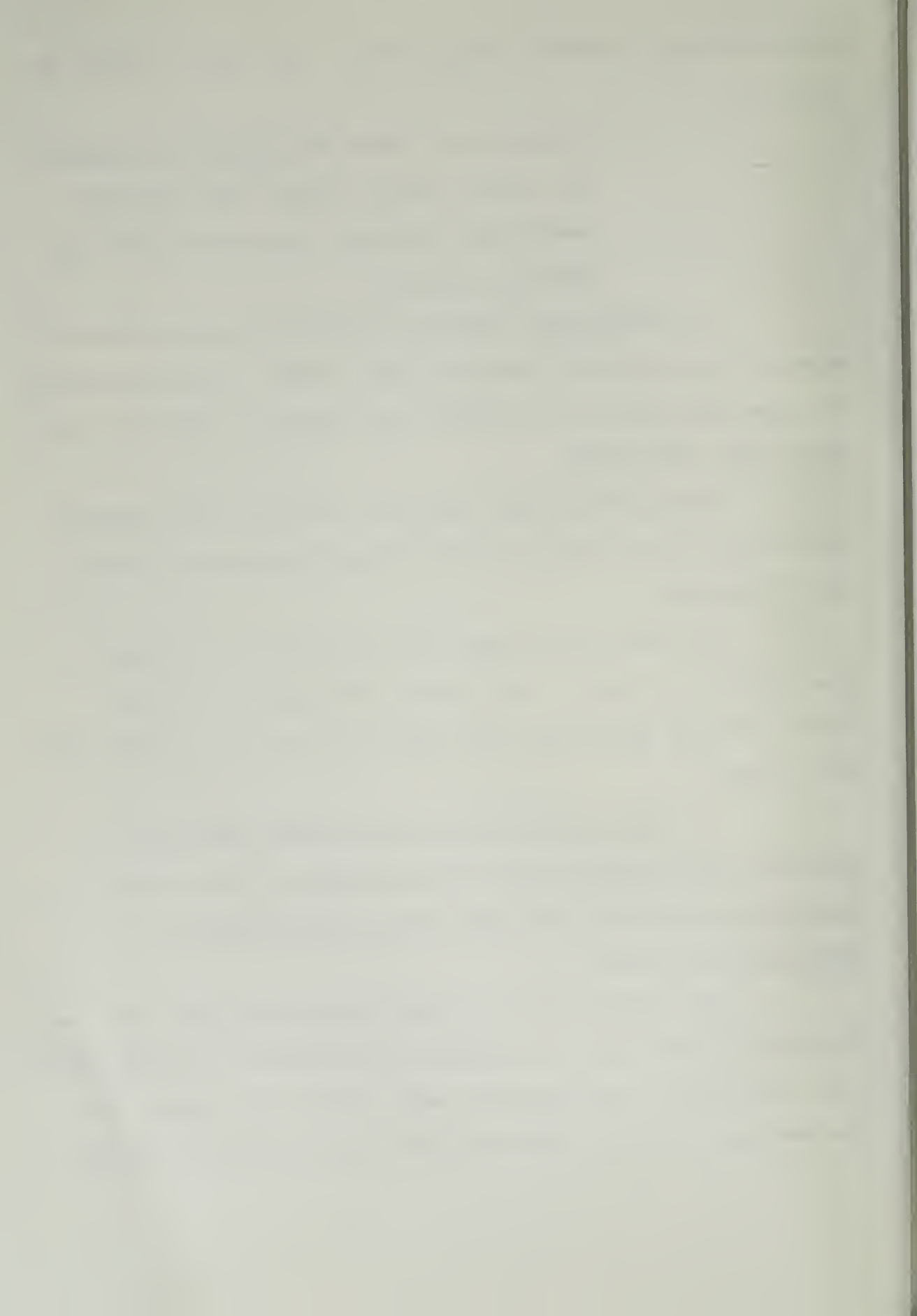
Co-conspirator Graybar cancelled the franchises of another San Francisco discount store, "GET", at approximately the same time that it was cancelling Manfree's Hotpoint franchise (Tr. 3068-3080).

Maytag West Coast likewise cancelled GET's Maytag franchise at the time it was also disenfranchising Manfree (Tr. 3332-3333).

Co-conspirator Meyer and appellee G.E. refused the requests of GET for the R.C.A., Whirlpool, and G.E. lines of major appliances and television sets (Tr. 4919; 4361-4366; 5246).

6. Joint and Collaborative Action Among the Appellee and Co-conspirator Manufacturers of Major Appliances and Television Sets Was Clearly Established By Substantial Evidence:

The manufacturers of major appliances who were involved in this case, Frigidaire, Borg-Warner (Norge Division), G.E., Whirlpool, and Hotpoint, were and are all members of the National Electric Manufacturers' Association ("N.E.M.A.").



(See Pl. Ex. No. 2090 (A-G).)

N.E.M.A. maintains a Consumer Products Division, which concerns itself with the products involved in this case. (See Pl. Ex. for Id. Nos. 3006, 3007, 3008-3011.)

As part of the members' activities in N.E.M.A., each is required to report its sales of major appliances in every county of the United States, by dealer classification, to the Association. Pursuant to these reports, each manufacturer requires its distributors to submit detailed reports of units sold to various retailers in the distributor's sales territory. The information is then sent by the manufacturers to N.E.M.A., tabulated, and thereafter each N.E.M.A. member receives a county-by-county analysis of its percentage share of the market. (Pl. Ex. for Id. Nos. 3009; 3000-3005; 2091-2099.)

Appellants offered to prove that N.E.M.A. members have agreed to prevent non-members from obtaining this market information, have agreed to common definitions of retail customers, and have exchanged specification and price information among themselves. (See Pl. Ex. for Id. Nos. 2093 (A, C-E); 2094 (A, C-N), 2095 (A, F-G), 2097 (A, F, S), 2098 (A, M), 3003, 3010; see Tr. 6457-6470).

Appellants further offered to prove that in June, 1960, at a Board of Directors Meeting of the N.E.M.A. Consumer Products Division, representatives from Borg-Warner, Frigidaire, G.E. and Whirlpool discussed the establishment of a fixed distribution pricing system, which contemplated that all distributors and dealers would be charged the same price by individual manufacturers (and their distributors), and that the manufacturer



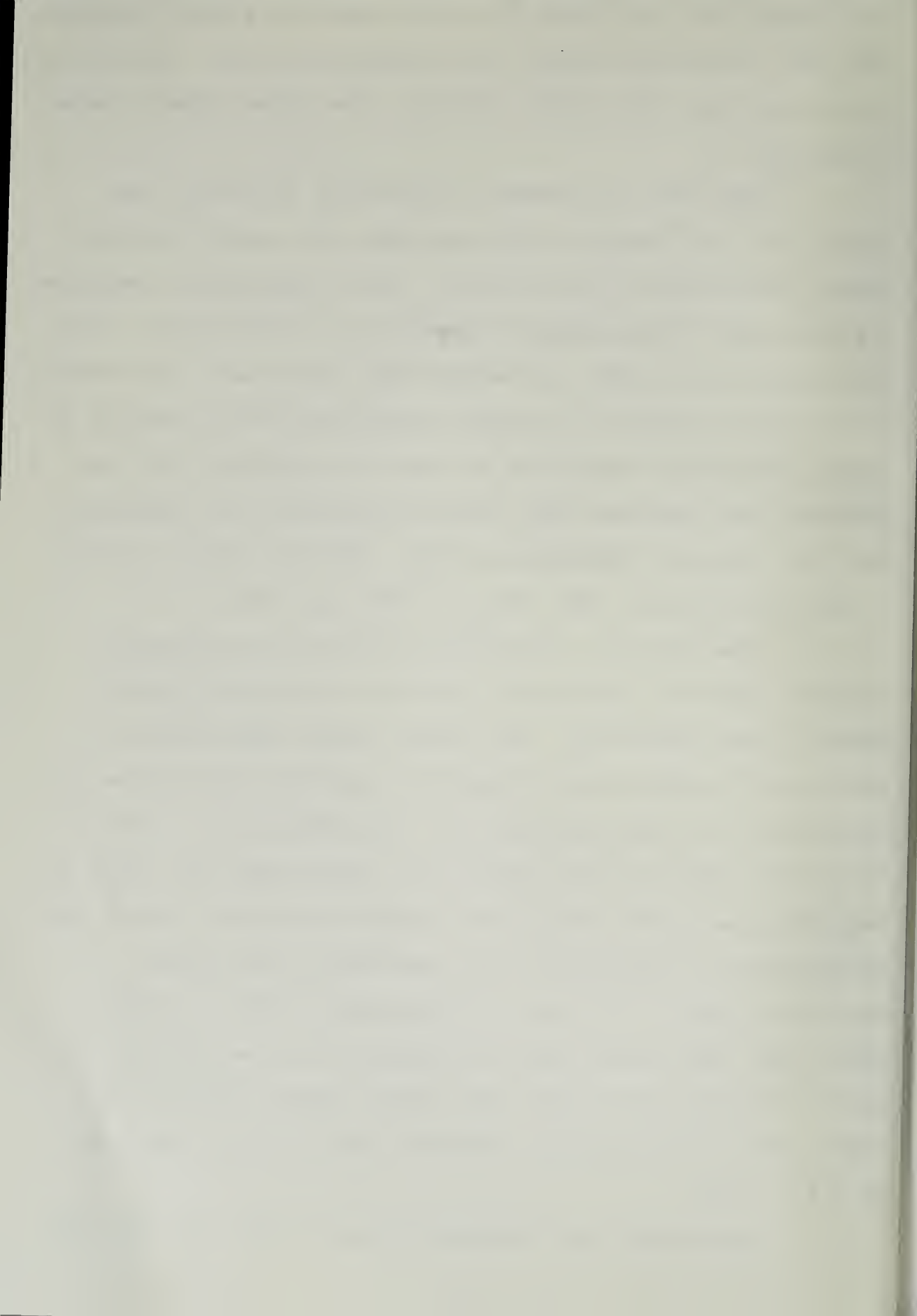
would agree with each other that each would not permit deviation from such established retail and distributor prices. (See Pl. Ex. for Id. Nos. 3006, 3007, and 431. The latter appears herein as Appendix B.)

Appellees Borg-Warner, Frigidaire, Hotpoint, and Maytag were also members of the American Home Laundry Manufacturers' Association ("A.H.L.M.A."). This organization assembled the same types of statistical information as did N.E.M.A., for the products with which its members were concerned. The members of A.H.L.M.A. agreed to a uniform advertising code, relating to proper advertising conduct on the part of retailers, and they insisted that retailers sign certain affidavits of "compliance" with the A.H.L.M.A. Advertising Code. (See Pl. Ex. No. 2, and Pl. Ex. for Id. Nos. 3036 (AE-AF), 3025, and 3026.)

The A.H.L.M.A. Advertising Code was significantly different from the advertising practices recommended by the Federal Trade Commission: The former speaks specifically of references in advertising of members' products (by retailers or otherwise) of a "manufacturer's or distributor's list price" or "suggested retail price"; and of such "advertised list price or suggested list price" being the "current list price" which the manufacturer or distributor has "published to the trade". (See Pl. Ex. No. 2, at page 1 of A.H.L.M.A. Code). On the other hand, the latter makes no reference to a manufacturer's or distributor's list price, but rather simply refers to an "established retail price". (See Pl. Ex. No. 2, at pages 5-6 of F.T.C. Code).

Appellants also offered evidence, which was rejected,





showing that A.H.L.M.A. members exchanged pricing information, and data about individual company's specifications for various appliances. (Pl. Ex. for Id. Nos. 3022, 3024, 3026, 3029, 3032, and 3037.)

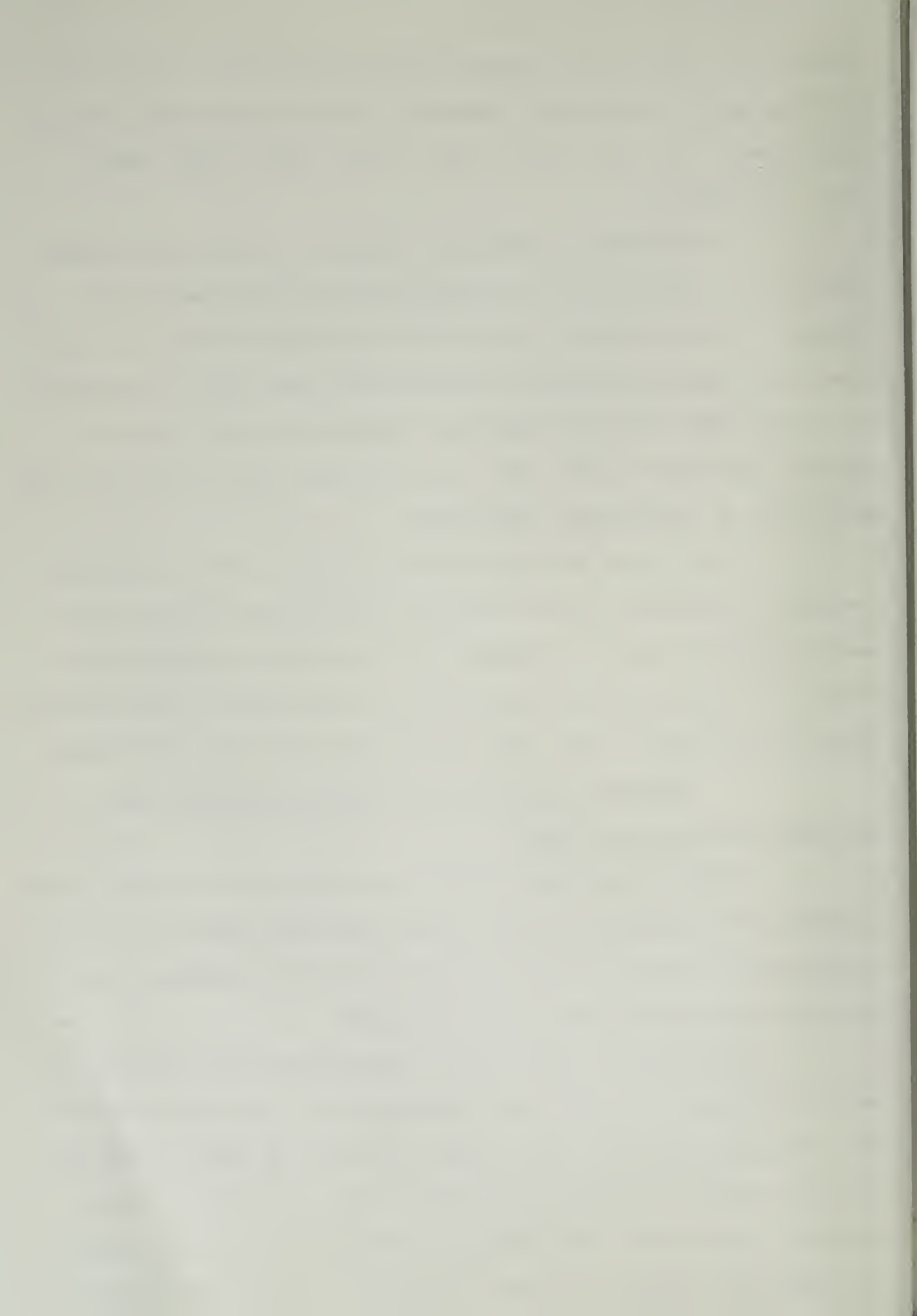
In addition, appellants offered to prove that appellees R.C.A. and G.E. and co-conspirator Motorola were also members of the Electric Industries Association ("E.I.A."), and that this trade association compiled the same type of statistical sales data collected from its members as does N.E.M.A. See Pl. Ex. Nos. 92, 93, 94, 174-183, 4119; Pl. Ex. for Id. Nos. 7 and 5068; Tr. 4809-4810, 6495-6496.

• And, as is the case with A.H.L.M.A., E.I.A. members reached an agreement upon a uniform advertising program that would apply to members' dealers, and required a dealer affidavit of advertising list prices as a condition to being granted advertising funds. (Pl. Ex. for Id. No. 5068; Tr. 4809-4810).

7. Evidence Of Continued Refusals To Deal With Manfree After August, 1960:

After Action No. 39,336 was commenced in August, 1960, appellants continued to make demands upon the appellee and co-conspirator vendors to be allowed to buy their leading brands of major appliances and television sets.

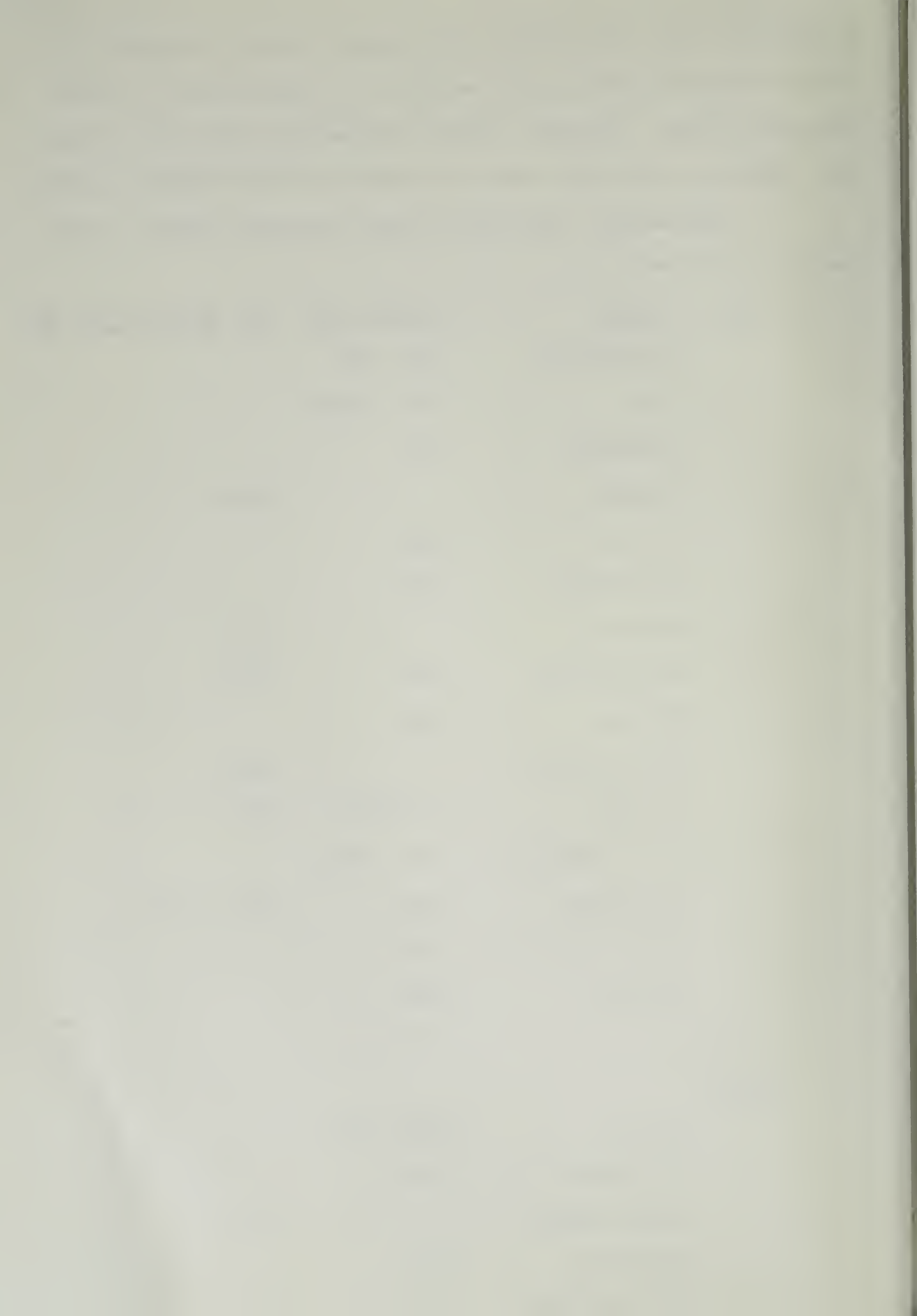
In October, 1961, U.S.E. discontinued the requirement of a membership card for admittance to its store premises. It informed various of the vendors refusing to sell to Manfree of this change in policy, by letters sent to each. In these letters, appellants repeated their requests to be permitted to purchase the subject products, noting that White Front Stores,



a discount store chain that had recently located outlets in the San Francisco Bay Area, was able to obtain many of these requested lines. Further letters requesting the right to buy such products were also sent to certain of the vendors in 1963.

Appellants' post-1960 letter requests appear in the record as follows:

1. <u>1961:</u>	<u>Vendor</u>	<u>Pl. Ex. No.</u>	<u>Pl. Ex. for Id. No.</u>
	Frigidaire	496, 497	
	G.E.	4274, 4276	
	Hotpoint	538	
	Maytag		4165
	R.C.A.	1692	
	Whirlpool	1716	
	Motorola		1761
	Borg-Warner	4038	1769
	Philco	4283	
	Westinghouse		1817
	Graybar	527, 4278	548
	A. H. Meyer Co.	1706, 4231	
	Lancaster	4285	1757, 1758
	Calif. Electric	1785	
	Basford	4282	
2. <u>1963:</u>			
	R.C.A.	1698, 1701	
	Whirlpool	1722	
	Norge Sales		1773
	Motorola	4201	
	Westinghouse	1818	

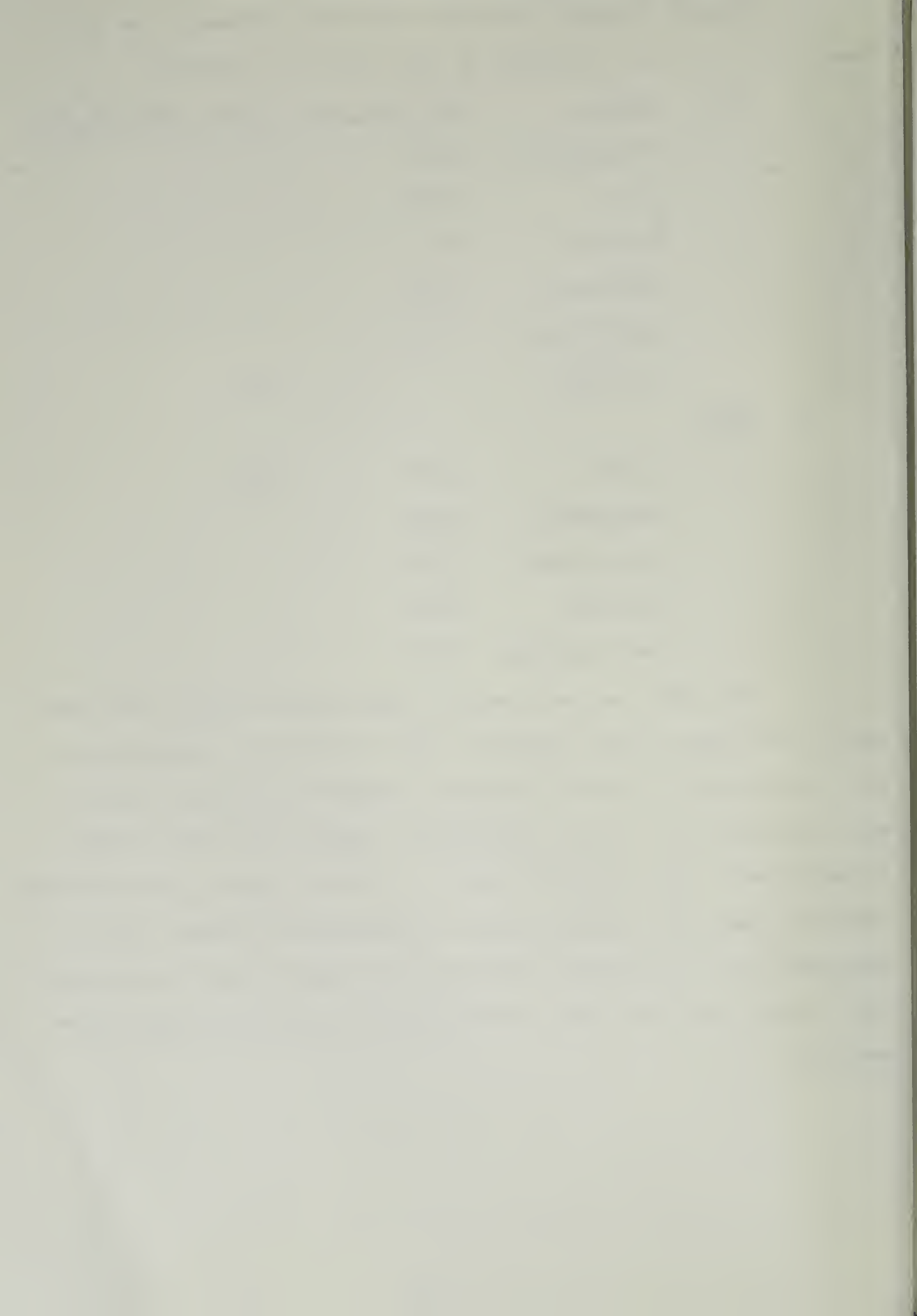


These requests were all uniformly refused. The refusals to deal are reflected in the record as follows:

1. <u>1961:</u>	<u>Vendor</u>	<u>Pl. Ex. No.</u>	<u>Pl. Ex. for Id. No.</u>
	Frigidaire	4270	
	R.C.A.	1693	
	Hotpoint	547	
	Whirlpool	1718	
	Borg-Warner	1771	
	Motorola		1762
2. <u>1963:</u>			
	R.C.A.	1684	1702
	Whirlpool	1721	
	Norge Sales	1775	
	Motorola	1763	
	Westinghouse	1819	

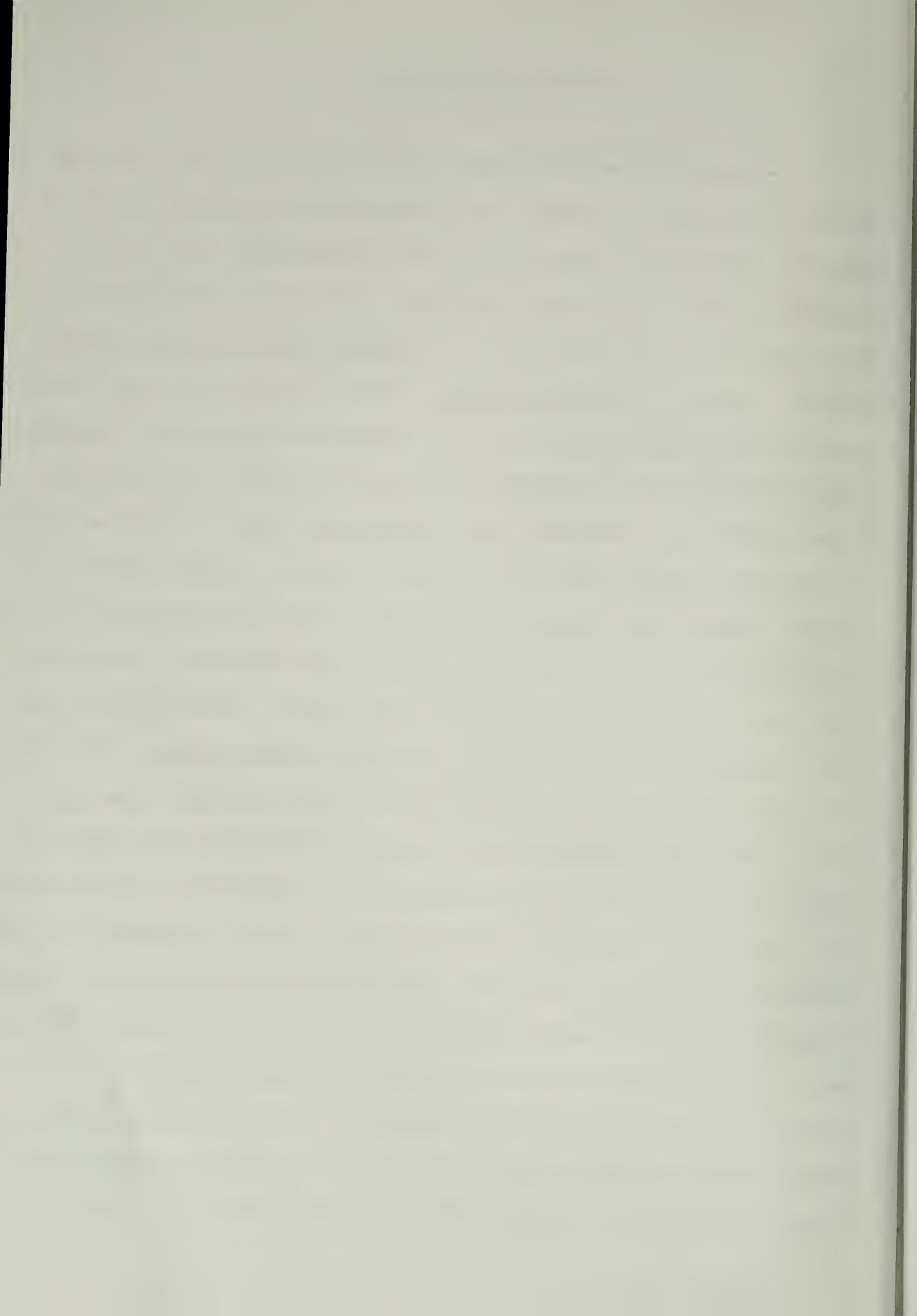
The 1963 request letters were occasioned by the opening of the White Front discount store in Oakland, California; its advertising in local newspapers showed that White Front was carrying G.E., R.C.A., Whirlpool, Philco and Norge lines of appliances and television sets. By their replies, the appellee and co-conspirator vendors either continued to refuse to deal with Manfree, or referred appellants to their local distributor, who in each case was also continuing its refusal to deal with Manfree.





## SUMMARY OF ARGUMENT

The fundamental issue in the trial of this case was whether or not an agreement or understanding existed, tacit or express, to boycott appellants. Such agreements "are seldom capable of proof by direct testimony and may be inferred from the things actually done....." Eastern States Retail Lumber Dealers' Assn. vs. United States, 234 U.S. 600, 611, 616 (1914). Evidence of refusals to deal by a group of competitors is admissible circumstantial evidence from which a trier of fact may infer agreement. Proof of the refusals to sell to Manfree among appellees and others, who were proven to have a common motive to support retail list pricing among the large, key retailers in the San Francisco retail market for major appliances and television sets, was sufficient evidence for appellants' case to go to the jury. Theatre Enterprises vs. Paramount Film D. Corp., 346 U.S., 537, 540, 541 (1953). In the face of such evidence, the jury alone, under our Constitutional system, determines what are the facts (and if denials of an agreement or combination by the defendants are true). Testimony that refusals to deal stemmed from an independent business decision, unrelated in any way to group action or agreement, is at most a defense to be weighed by the trier of fact. Such evidence does not permit a directed verdict, but is properly a case for jury determination. Continental Ore Corp. vs. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Standard Oil Co. of California vs. Moore, 251 F. 2d 188 (9th Cir. 1957);



Girardi vs. Gates Rubber Company Sales Division, Inc. 325 F. 2d 196 (9th Cir. 1963). The defendants' claims are not binding on the Court; their defenses are weighed by the trier of facts in the context of the particular market situation.

United States vs. Arnold, Schwinn & Co., 87 S.Ct. 1856, 1863 (1967).

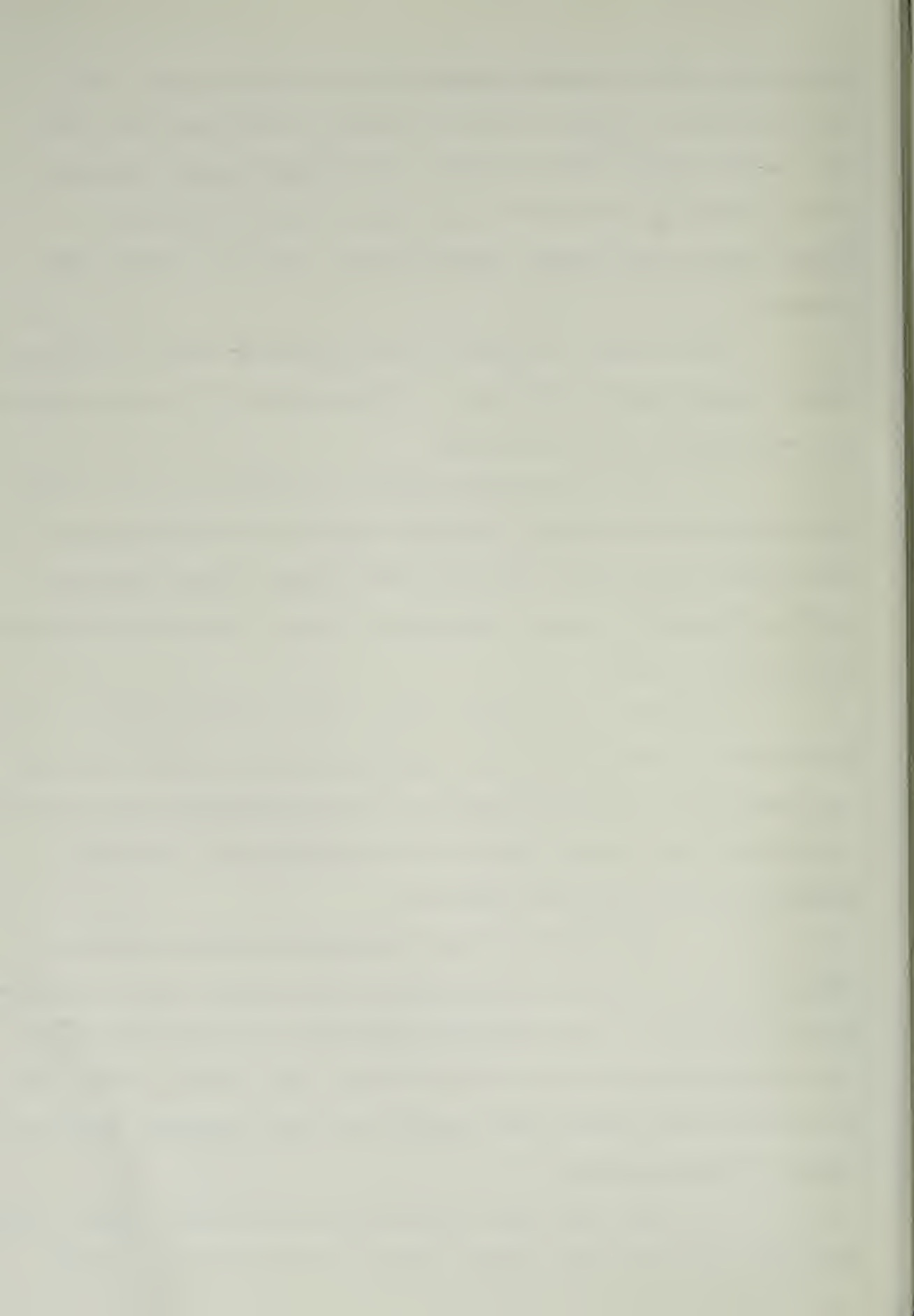
Appellants' evidence of an agreement, tacit or express among the appellees and their co-conspirators to boycott appellants was substantial and convincing:

(1) Appellant Manfree requested and was denied the twelve leading brands of major appliances and television sets during the period 1959 to 1964, Norge, Philco Hotpoint, Maytag, Frigidaire, G.E., Whirlpool, R.C.A., Motorola, Westinghouse, Sylvania and Zenith.

(2) Appellant U.S.E. (as a landlord) was a discount store operation, and its lessee, Manfree, would not tag or advertise the subject products at the manufacturers' and distributors' list prices, as did the co-conspirator retailers competing with it in San Francisco.

(3) Each of the distributor defendants were shown to have a common motive to use list prices, and to require their retailers in the market to advertise at these prices by not allowing advertising credits unless they did so. The funds to support this scheme came largely from the defendant manufacturers of the products.

(4) All the manufacturer defendants worked close with Hale and the other retail store co-conspirators, as the



"key accounts" in the San Francisco market, and these retailers were supported by the manufacturers with special advertising funds. Discount store advertising, at "cut prices", threatened this controlled, non-competitive market.

(5) Manfree was able to obtain certain lines of merchandise during the period 1957-1959 (Norge, Philco, Maytag, Hotpoint). At the time of the cancellation of these lines, Manfree's officers were told, by vendor representatives, that the reasons for such cancellations were (i) pressure upon the vendors not to sell to Manfree from Hale, or from the other large San Francisco retailers, or (ii) threats that if they sold to Manfree, they could not sell to such competing retailers.

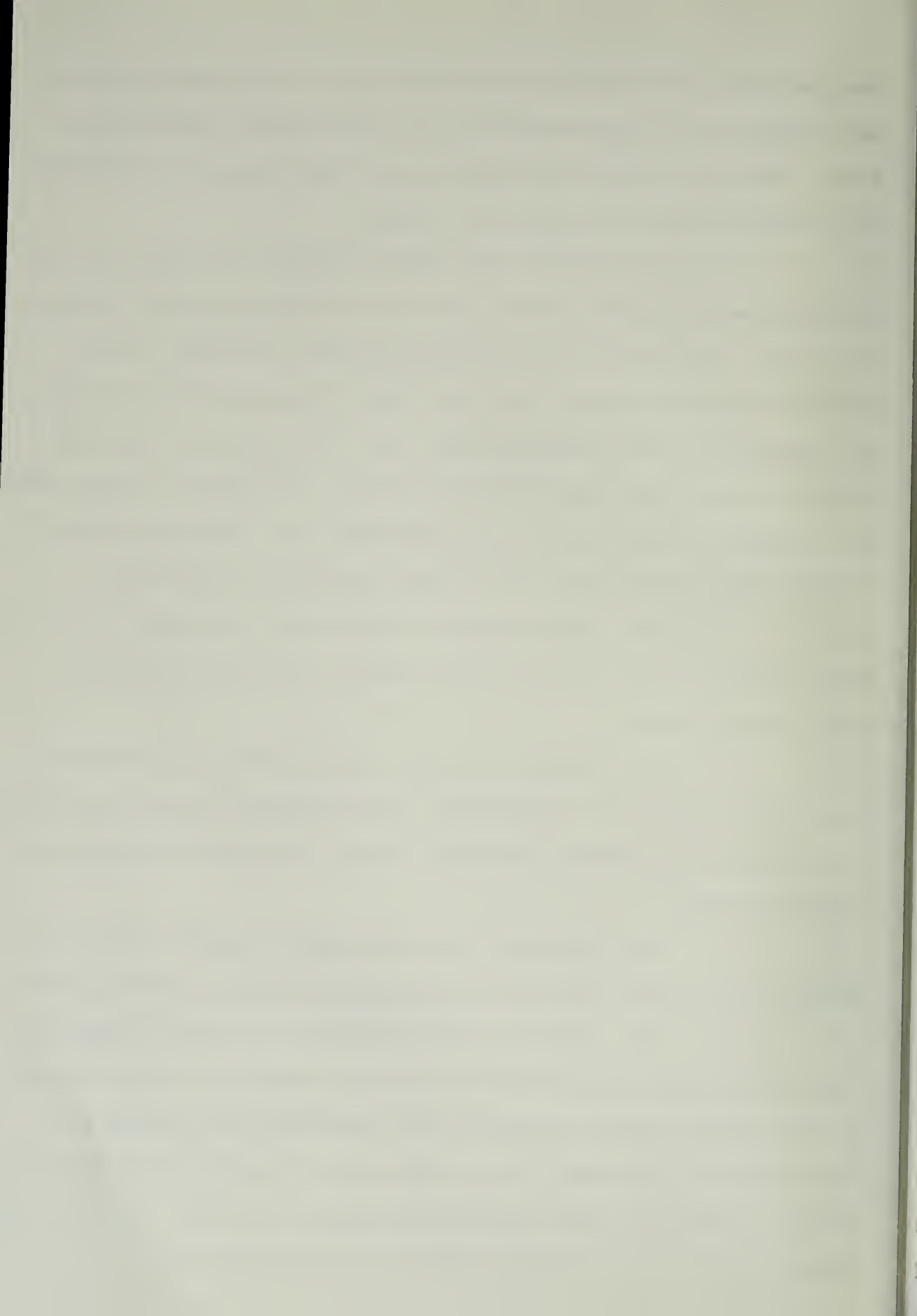
(6) While Manfree carried the Hotpoint and Maytag lines, Hale and the other co-conspirator retailers refused to carry these lines.

(7) During the short time Manfree could obtain Norge and Philco major appliances, Hale refused to use advertising credits from vendors of these lines, or refused to pay past-due debits to them.

(8) Manfree's cancellation by Maytag was coincidental with a large \$11,000.00 purchase of Maytag goods by Hale.

(9) Manfree's cancellation by Graybar (Hotpoint distributor) was coincidental with that company's establishment of an advertising policy requiring its retailers to advertise at list price (Pl. Ex. Nos. 339, 340); and a San Francisco meeting called by Graybar, well attended by large retailers, where it was announced it would no longer sell to discount stores.





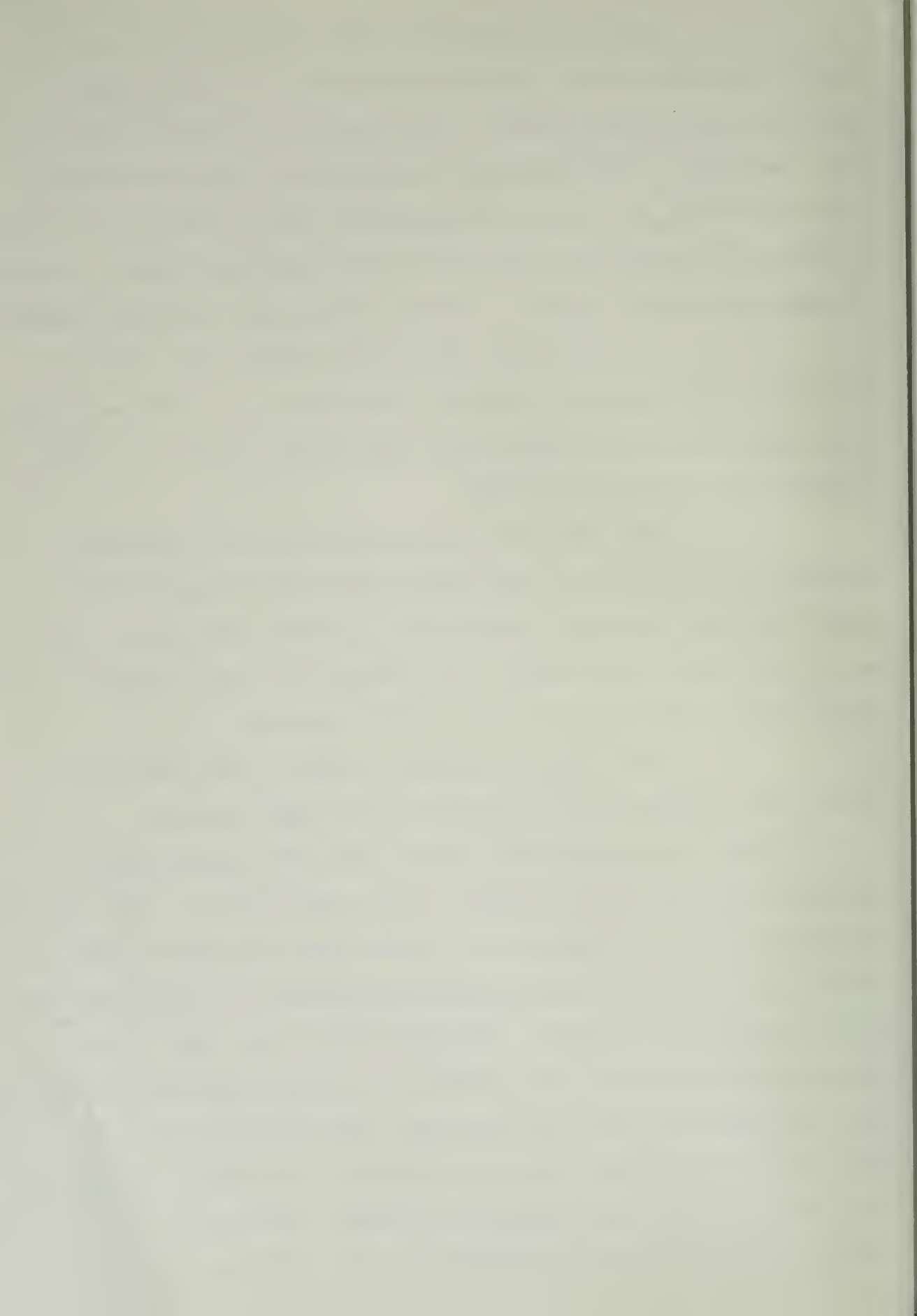
(10) The boycott of appellants extended beyond the San Francisco area. Manfree was unable to obtain Norge appliances from Norge Sales, or its Southern California distributor, (Graybar). After Manfree had obtained a carload of Norge appliances from Los Angeles, Norge Sales held a meeting with its California distributors concerning such shipments, which resulted in appellants being unable to obtain Norge goods from any source.

(11) Manfree could never obtain G.E., R.C.A., Whirlpool, or Frigidaire products because it was a discount store. Bona fide requests by Manfree for substantial orders to these vendors were repeatedly denied.

(12) The two San Francisco morning newspapers refused to accept U.S.E. advertising from 1957 through 1960 because the large retailer advertisers in those newspapers, such as Hale's, Macy's and others, put pressure on them to refuse such advertising (Borg-Warner Ex. No. 9024, stricken).

(13) Another discount store in San Francisco, "GET", was substantially boycotted by the same vendors.

The evidence further showed that the conspirator defendants met together in various trade associations. The appellee manufacturers of frigidaires and other major appliances worked together on a campaign to establish and maintain a nation-wide list price distribution system. (Pl. Ex. for Id. No. 431). Certain conspirator defendants met together in various Northern California and San Francisco trade associations. One of these groups to which the retailer defendants and most defendant distributors belonged, the Northern California Electrical Bureau, developed a local campaign requiring retailers to sign affidavits that

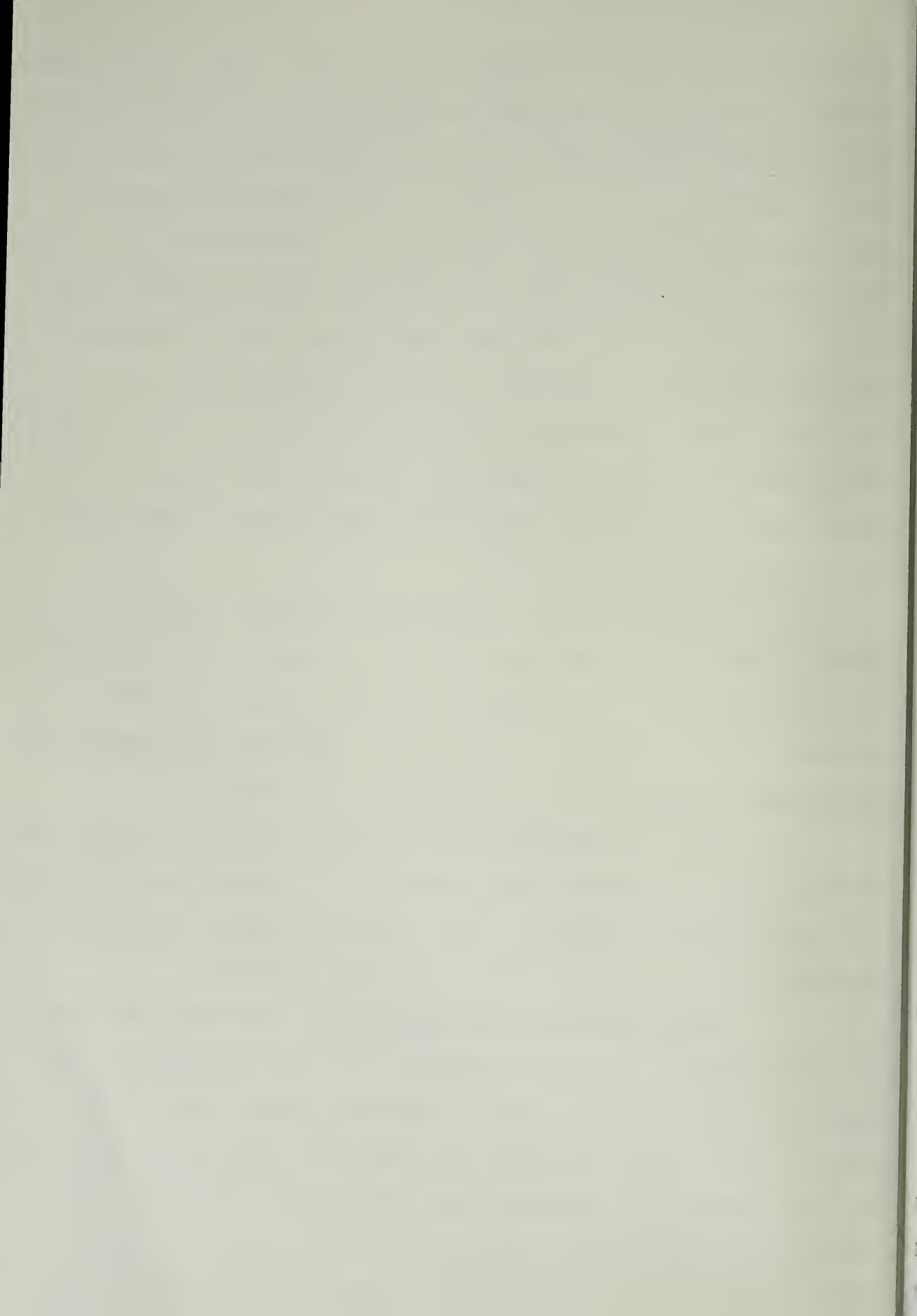


appliances were sold at suggested list price. (Pl. Ex. No. 2090). Another association, the Home Furnishing Advisory Committee of the San Francisco Better Business Bureau (whose members included Lachm Bros., Redlick, Sterling and Macy's, held meetings concerning the advertising of furniture and household appliances in the San Francisco newspapers during the period 1957 to 1960. One member co-conspirator, Sterling, approached the San Francisco News Call Bulletin to discuss the U.S.E. advertising it was carrying. The circumstances shown to be involved in this meeting would allow the jury to reasonably conclude that pressure was being applied to prevent U.S.E. from advertising in that newspaper, as well.

The defenses of independent business judgment in refusing to deal was, under this evidence, simply a jury question, and the Trial Court, it is respectfully urged, could not turn these defenses into a decision on the merits. Standard Oil Company of California v. Moore, 251 F. 2d 188 (9th Cir. 1957).

Even assuming that the evidence admitted was not substantial on the issue of the existence of a conspiracy to boycott, the record demands reversal of the judgment below because substantial evidence was excluded as to each appellee.

California Electric Supply Co.: The Court excluded the admissions of its Sales Manager, Mr. J. T. Valenson, that appellants had a million dollar conspiracy case, that he had been asked to give false testimony, and that his salesman handling the Manfree account, Mr. Muntain, had given false testimony in his deposition in the case. California Electric Supply sought to defend its refusal to deal at this deposition and during trial,



evidence admitted was to the contrary and these admissions were clearly admissible against this appellee, and against all the conspirators.

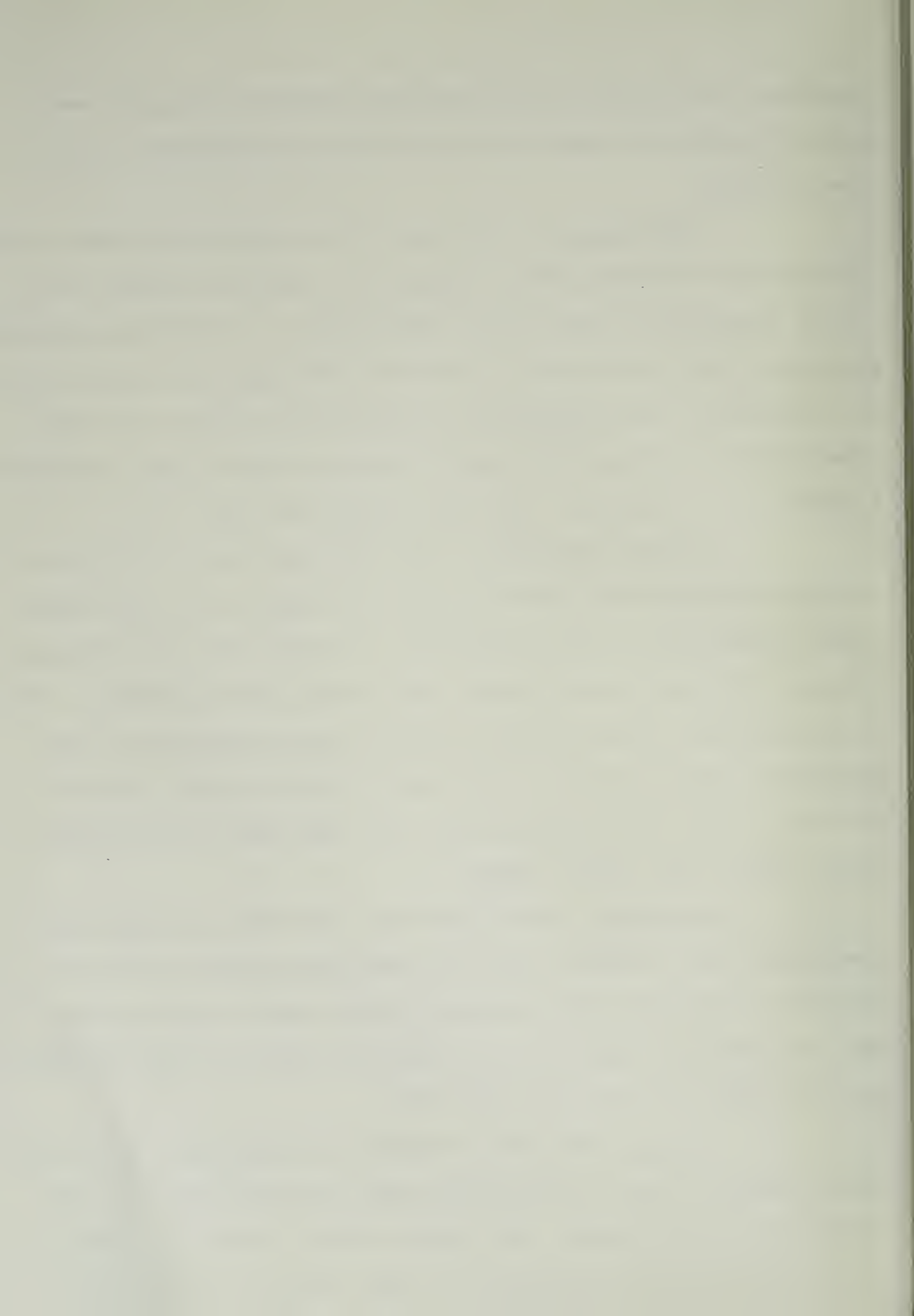
Borg-Warner: The Court first admitted and then struck Borg-Warner's Exhibit 9024, evidence of retailer pressure on a local newspaper to deny U.S.E. advertising. It further excluded evidence from Borg-Warner's files that the appellee manufactures of frigidaire were attempting to establish a fixed and rigid distribution system in the United States, based in part upon maintenance of list price. (Pl. Ex. for Id. No. 431).

General Electric: The Court excluded G. E.'s intra-office correspondence admitting that its dealers did not engage in price competition in San Francisco, and that sales to a discount store in the area would disrupt the retail price structure. This correspondence further showed that the major appliance manufacturers had knowledge of the brands carried by the discount stores in the San Francisco area. (Pl. Ex. for Id. Nos. 5032, 5033, 5034, 5044, 5045 - 5047).

Hotpoint: As to Hotpoint, the Court excluded the testimony from Graybar's District Appliance Manager that the consent of Hotpoint was necessary before Graybar would cease selling Hotpoint appliances to discount stores in San Francisco. (Pl. Ex. for Id. Nos. 5112 and 5113).

R.C.A.: The Court rejected correspondence and testimony showing R.C.A.'s involvement with the maintenance of list prices in San Francisco. The Court further excluded evidence that R.C.A. required retailers to sign affidavits concerning





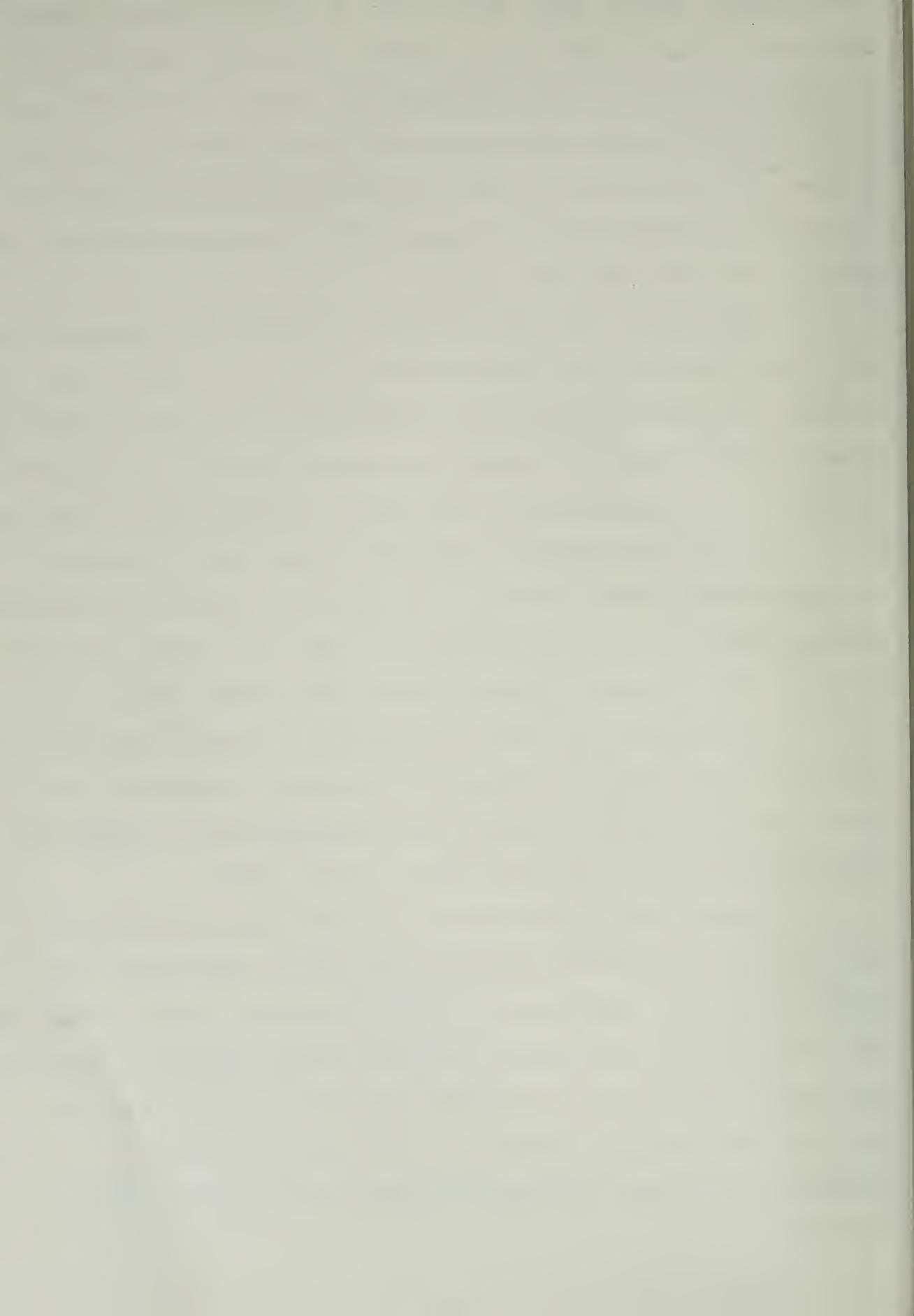
"comparative" retail price advertising in order to obtain advertising funds. (Pl. Ex. for Id. No. 5068). The Court rejected the testimony of R.C.A.'s Vice President, Mr. Saxon, that it did not engage in retail price competition with other television manufacturers. It also failed to give any probative weight to substantiated evidence of business contacts between R.C.A.'s representatives and Hale's. (Pl. Ex. Nos. 349, 350).

Whirlpool: The Court failed to consider the evidence that R.C.A. and Whirlpool had common directors. Instead, the Court accepted the argument that it is conjectural to imagine a manufacturer and distributor of washers and dryers conspiring with manufacturers of television sets, and stated that the product lines of R.C.A. are entirely different from the product line of Maytag. It also failed to give probative value to the evidence of numerous meetings between Whirlpool and Hale's. (Id., Tr. 5061). (See Pl. Ex. Nos. 685A-C, 686A-E, 687A-C, 689A-B, 665, 4236, 4237.)

Frigidaire: The Court rejected the evidence upon which the jury could determine that Frigidaire continued to maintain list prices after 1961 when it discontinued printing price sheets containing list prices. (Pl. Ex. for Id. 4170, 4178).

Maytag: The Court refused to allow appellants to prove that the Regional Manager of Maytag West Coast told Manfree that it had changed its sales policy in San Francisco, was no longer going to sell to discount stores, and thus could not sell to Manfree any longer. This ruling completely rejected the principle that a plaintiff may prove the reason for the refusal to deal.

Continental Ore Corp. vs. Union Carbide & Carbon Corp. 370 U.S. 690 (1962).

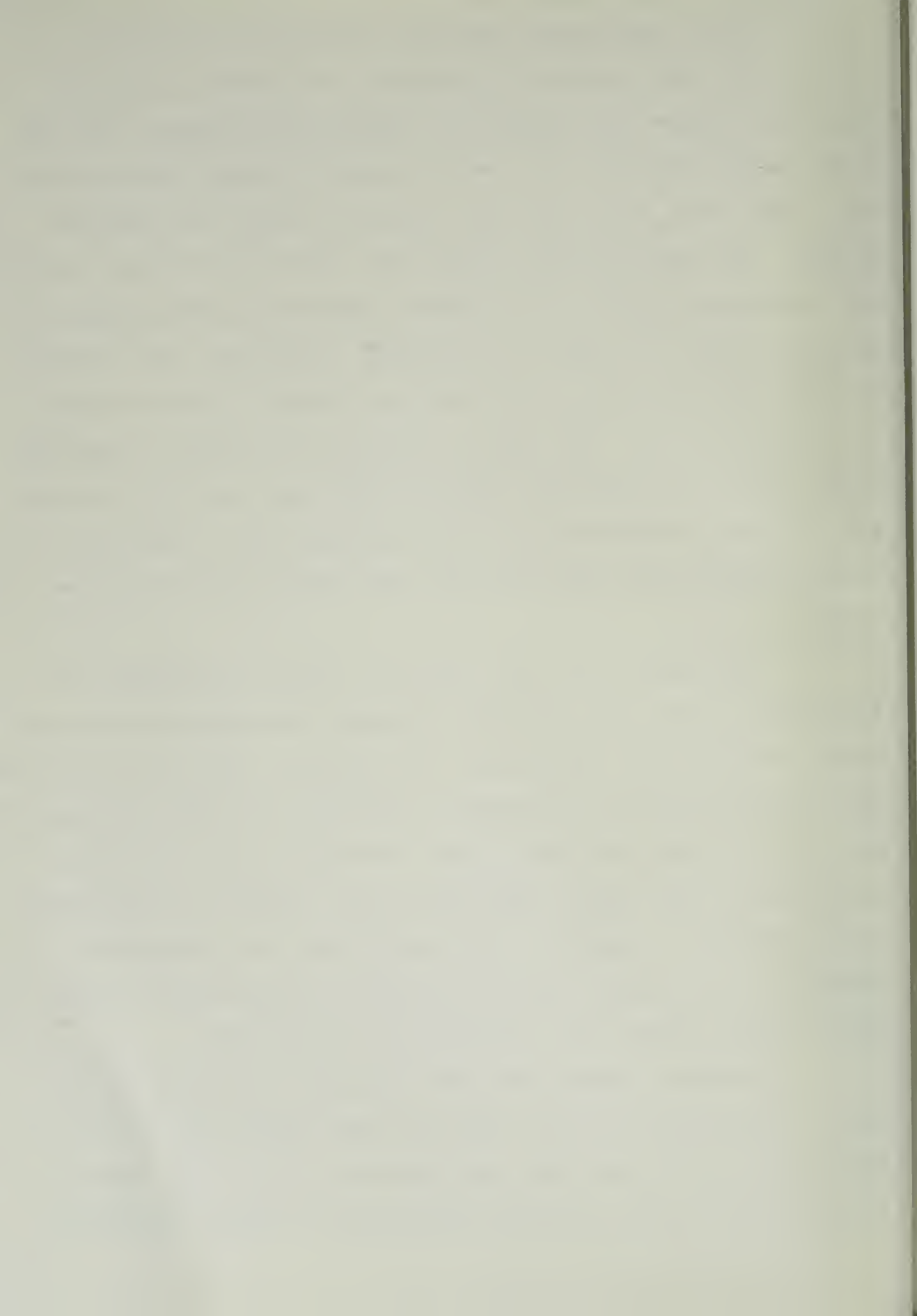


Other substantial relevant evidence was rejected:

The Court refused to allow Mr. Vern Brown, District Appliance Manager for Graybar, to testify that Graybar knew the issue in San Francisco was one of having to choose between selling to the large department and furniture stores, or discount stores. The basis of this ruling that appellants had not detailed the subject matter of Mr. Brown's testimony sufficiently in pretrial papers, is urged as erroneous. The Court also refused to allow the testimony of the District Manager of Westinghouse to the same effect. The Court's ruling with respect to Westinghouse, that such testimony would be based upon opinion and hearsay is urged as erroneous, as the evidence itself showed that such vendors based their sales policies upon such information from the field.

The deposition of Mr. Alpine, U.S.E.'s president who died before trial, was rejected, although defendants had substantially completed the deposition. The basis of the ruling was that the defendants were not allowed to complete the deposition because they did not have available at the deposition memoranda of his conversation with vendor representatives, prepared by Mr. Alpine at his attorney's request. The record shows that defendants delayed an unreasonable period of time in attempting to obtain these reports, which were claimed to be privileged.

Evidence showing that the National Electrical Manufacturers' Association and the American Home Laundry Manufacturers' Association worked together, was rejected. Yet, this evidence showed a clear common purpose and motive to support agreements



which prevented challenges to their controlled market. (See United States vs. General Motors Corp. 384 U.S. 127(1966).)

The Court rejected the studies of appellants' accountant, showing that the retail defendants tagged the subject products at list price. (Pl. Ex. for Id. Nos. 1561 - 1578 (Hale's); 1579 - 1681 (Lachman Bros.); and 1560 (Redlick).)

Evidence offered by appellants of the conspiracy to boycott Klor's, Inc., another local retailer, by appellees G.E., R.C.A., and Whirlpool, prior to January, 1967, was admissible evidence under the authority of Standard Oil Co. of California vs. Moore, 251 F.2d 188 (9th Cir. 1957). (See Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959).)

Even assuming the evidence of appellants was not substantial on the conspiracy issue, the record requires reversal of the judgment below because appellants should have been permitted to present their evidence and have a jury determination on the issue of refusals to deal, based on maintaining vertical price agreements. This theory of appellants' case was rejected by the Court, despite its assertion in the complaints and the pretrial papers. A plaintiff is entitled to obtain damages based upon all violations of antitrust laws which injure them. (Continental Ore Corp. vs. Union Carbide & Carbon Corp., supra.)

Further, in accepting evidence, the Court failed to apply the oral declarations of agents of the distributors against the factory defendants, and refused to allow appellants the right to treat witness representatives of conspirators as hostile and





adverse. Yet the Court did make the written evidence introduced as to one conspirator, applicable to all other conspirators. (Tr. 6854).

The Court dismissed appellee Norge Sales, who was joined as a party in the second complaint. This was erroneous, as appellants could always add a conspirator as a party, who would be liable for damages committed, pursuant to the conspiracy, within four years of its joinder as a party defendant.

Appellants' pre-trial discovery was prejudicially limited by the Court in not allowing production of all intra-office reports of appellees concerning the appellants, and by not allowing them to develop the existence of, or admissibility of, appellees' witness, interview statements or reports.

The Court also committed reversible error in the allowance of costs by taxing appellants with the costs of two copies of the daily transcript; costs of copies of the depositions; costs of pretrial transcripts, and certain other costs.



## ARGUMENT

### I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR  
IN DIRECTING A VERDICT FOR EACH DEFENDANT,  
AND IN DISMISSING THE COMPLAINTS AS TO ALL  
OF THE APPELLEES

(Specification of Errors I)

A. The Judgment For Appellees Is Not Proper, As It Is Based Upon The Failure Of The Court To Give Appellants' Evidence The Benefit Of All Inferences It Fairly Supports (Even Though Contrary Inferences Might Reasonably Be Drawn), And In The Light Most Favorable To Appellants. This Is Especially True As The Basic Facts Are Largely Undisputed, And Consist Of Direct Evidence Showing A Common Boycott Of Appellants:

1. Appellants' direct evidence showed the boycotting of appellants by the vendor appellees and co-conspirators, because Manfree's pricing policy did not follow list prices, and because appellants were a discount store operation which threatened the San Francisco retail market controlled by the appellees and their co-conspirators.

The Seventh Amendment of the United States Constitution guarantees appellants a trial by jury; it entitles them to a jury determination of their claim that their evidence would show that it was more likely true than not, that appellees and their co-conspirators boycotted appellants in violation of the antitrust laws. A Federal District Court may only take a case away from a jury when it can be said that reasonable men, exercising an unprejudiced judgment, would draw opposite conclusions from the facts presented. Story Parchment Co. vs. Patterson Parchment Paper Co., 282 U.S. 555, 560, 566-567 (1931); Continental Ore Co. vs. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962); Girardi vs. Gates Rubber Company



Sales Division, Inc., 325 F.2d 196, 200, 206, 204 (9th Cir. 1963).

F.R.C.P. Rules 41(b) and 50 cannot be properly applied when substantial evidence introduced shows a concerted or group refusal to deal, among competitors. United States vs. General Motors Corp., 384 U.S. 127, 141-143 (1966); Klor's Inc. vs. Broadway-Hale Stores, Inc., 359 U.S. 207, 209-211 (1959); Theatre Enterprises vs. Paramount Film D. Corp., 346 U.S. 537 (1953). As stated by the Supreme Court in Theatre Enterprises, supra, at pp. 540-541:

"The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement." (Citing cases)

Refusals to deal have persuasive evidentiary significance in boycott cases, and this Court has consistently held that refusals to deal are to be examined in their market context. Flinkote Company vs. Lysfjord, 246 F.2d 368, 375-376 (9th Cir. 1957); Standard Oil Co. of California vs. Moore, 251 F.2d 188, 205-210 (9th Cir. 1957); Sunkist Growers, Inc. vs. Winckler & Smith Citrus Prod. Co., 284 F.2d 1, 10-18 (9th Cir. 1962); Girardi vs. Gates Rubber Company Sales Division, Inc., 325 F.2d 196, 199 (9th Cir. 1963). The instant appeal involves an antitrust action in which appellants have presented substantial evidence of a concerted refusal to deal. The appellees attempted to justify the common refusals to deal with Manfree as being decisions solely based upon individual business judgment. However, this but presents the classic





factual question of what is the truth of the matter, which goes to a jury for its decision upon credibility. See Girardi vs. Gates Rubber Company Sales Division, Inc., supra, at pp. 200, 202-203; Story Parchment Co. vs. Patterson Parchment Paper Co., supra, at p. 567. At the time of the refusals to deal (or the cancellation of Manfree's few franchises), which completely isolated Manfree from the sources of supply, officers of appellants were expressly told upon numerous occasions by various vendor representatives, that the particular vendor could not (continue to) supply Manfree, because of pressure from co-conspirator Hale; or that they could not sell to the downtown or large department stores and to Manfree at the same time; or because of so-called "dealer structure" (the existing dealers would not countenance sales to competing discount stores).

The jury is the only fact-finding body to determine the credibility of the testimony of appellants' witnesses Bernard Freeman, Marvin Boyd, Vern Brown, Joseph Mittelman, Bert Green, and Victor Honig. These witnesses testified or produced evidence proving that a group boycott existed against appellants. A jury decision for appellants, based on the testimony of these witnesses and appellants' documentary evidence admitted in evidence, clearly would be adequately supported by substantial evidence. The Court below however, it is respectfully urged, adopted the same erroneous course as did the trial courts in the cases of General Motors (supra) and Lessig vs. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), cert. den. 377 U.S. 993 (1964): It failed to apply proper legal standards to the admitted refusals to deal with appellants, and to the



admissions by representatives of appellees and co-conspirators that the vendors of the products involved could not sell to discount stores in San Francisco County because of illegal pressures from the retail store conspirators who were competitors of Manfree. It refused to give proper legal significance to proven refusals to deal being utilized as a means of enforcing illegal price control. Appellants' evidence showed as follows:

a. The suppliers of twelve leading brands of major appliances and television sets refused to deal with Manfree. (Supra, pages 41-52, 54-62, 67-69, 74-76).

b. Some vendors did sell to Manfree for periods of time, but subsequently they refused to continue to deal with appellants. (Supra, pages 43-47).

c. At the time of these cancellations, sales representatives of various vendors told officers of Manfree that such actions were necessary because of great pressure from their "downtown" retailers, or because of instructions from management to change pre-existing sales policies to now exclude discount stores:

(1) Co-conspirator Lancaster's salesman, Mr. Jack Mitchell, told Mr. Freeman of Manfree in 1957 that Lancaster had been subjected to pressure from Hale representatives not to sell to Manfree; that his company held a meeting to discuss the situation, deciding that under such circumstances Lancaster would not sell to Manfree any longer. (Supra, page 43; Tr. 5808-5809).

(2) California Electric's sales



representative, Mr. John Muntain, told Mr. Freeman in about September, 1958, that his company ceased selling Philco appliances to Manfree because of pressure from other San Francisco retail stores not to continue to do so. (Tr. 5736-5737).

(3) Co-conspirator Graybar's representative, Mr. W. H. Mayben, told Mr. Freeman in October, 1958, that Graybar would be unable to sell to department or other stores, so long as it was selling to discount stores, and that therefore Graybar would no longer sell Hotpoint appliances to Manfree (Tr. 5797-5798).

(4) Manfree's franchise was cancelled by Maytag West Coast on March 10, 1959, immediately following a period in which Hale would not buy or advertise Maytag products. Almost coincidental with Manfree's cancellation, Maytag sold \$11,000.00 in Maytag appliances to Hale. (Supra, pages 46-47; see Pl. Ex. Nos. 639 and 640).

(5) Graybar's Los Angeles outlet refused to continue to transship Norge appliances to Manfree, because Borg-Warner and Lancaster requested it not to sell in Lancaster's "territory". Borg-Warner's sales arm, appellee Norge Sales, had fined Graybar for prior transshipments, and refused to sell its appliances to U.E.S.'s buying agent in Los Angeles, Mr. Bert Green. (Supra, pages 49-52). At the time of this action, Mr. Bonnet, an officer of Graybar in Los Angeles, told Mr. Green that he had just been told by Lancaster, during a telephone call, that the latter would not sell to Manfree, because it did not want to "jeopardize a million dollar business" with Hale. (Supra, pages 50-51; Tr. 5509).



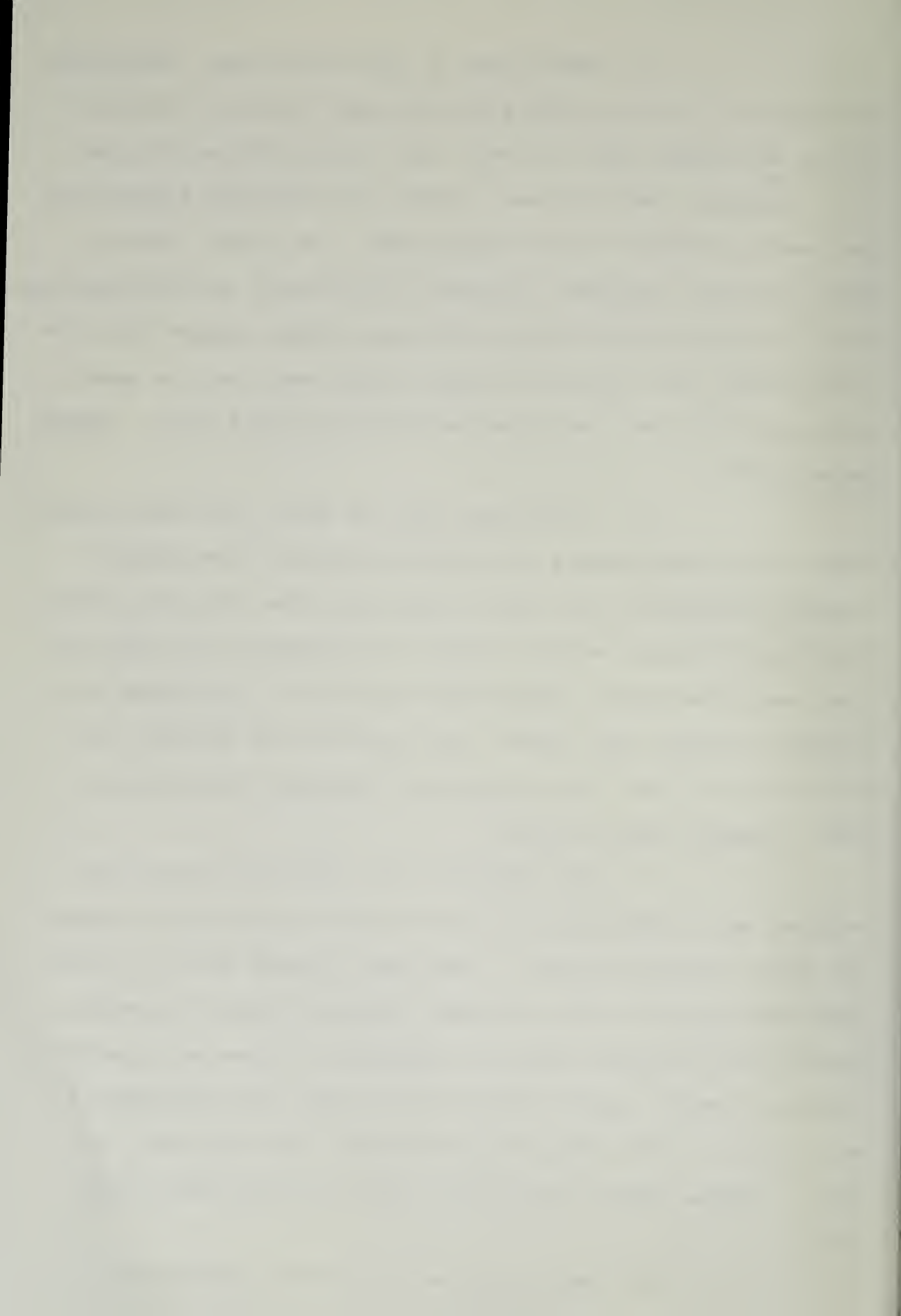


d. Seven lines of television sets, comprising virtually all of the leading brands, were denied to Manfree during the period 1957 to 1964, i.e., R.C.A.-Victor, Philco, G.E., Motorola, Westinghouse, Zenith, and Sylvania (1958-1963). The leading brands of major appliances, i.e., G.E., Philco, Norge, Maytag, Whirlpool, Hotpoint, Frigidaire, and Westinghouse, were denied to Manfree during the same period, except for limited periods when several of these brands were sold to appellant on a "no-name - no price" advertising basis only. (Supra, pages 42-44).

e. In June and July of 1960, the vendor appellees and co-conspirators all received letters from Manfree urgently requesting the right to purchase the lines they sold, but they uniformly refused to deal with appellant in spite of what was a reasonable request that Manfree be franchised and allowed to carry such lines. This uniform and unbroken common refusal to deal by such vendors continued until August, 1964. (Supra, pages 74-76).

f. The companies that refused to deal with Manfree, when asked to do so could offer no convincing reasons for their refusals to deal. They only claimed that such decisions were based on some ethereal, general "policy" grounds. Maytag and California Electric attempted to show more specific reasons; however, such "reasons" once again only presented a valid issue of "who(what) do you believe" for the trier of fact. (Supra, pages 47-49, 54-62; see Tr. 3375-3379; 3958-3971).

g. Each appellee manufacturer admittedly

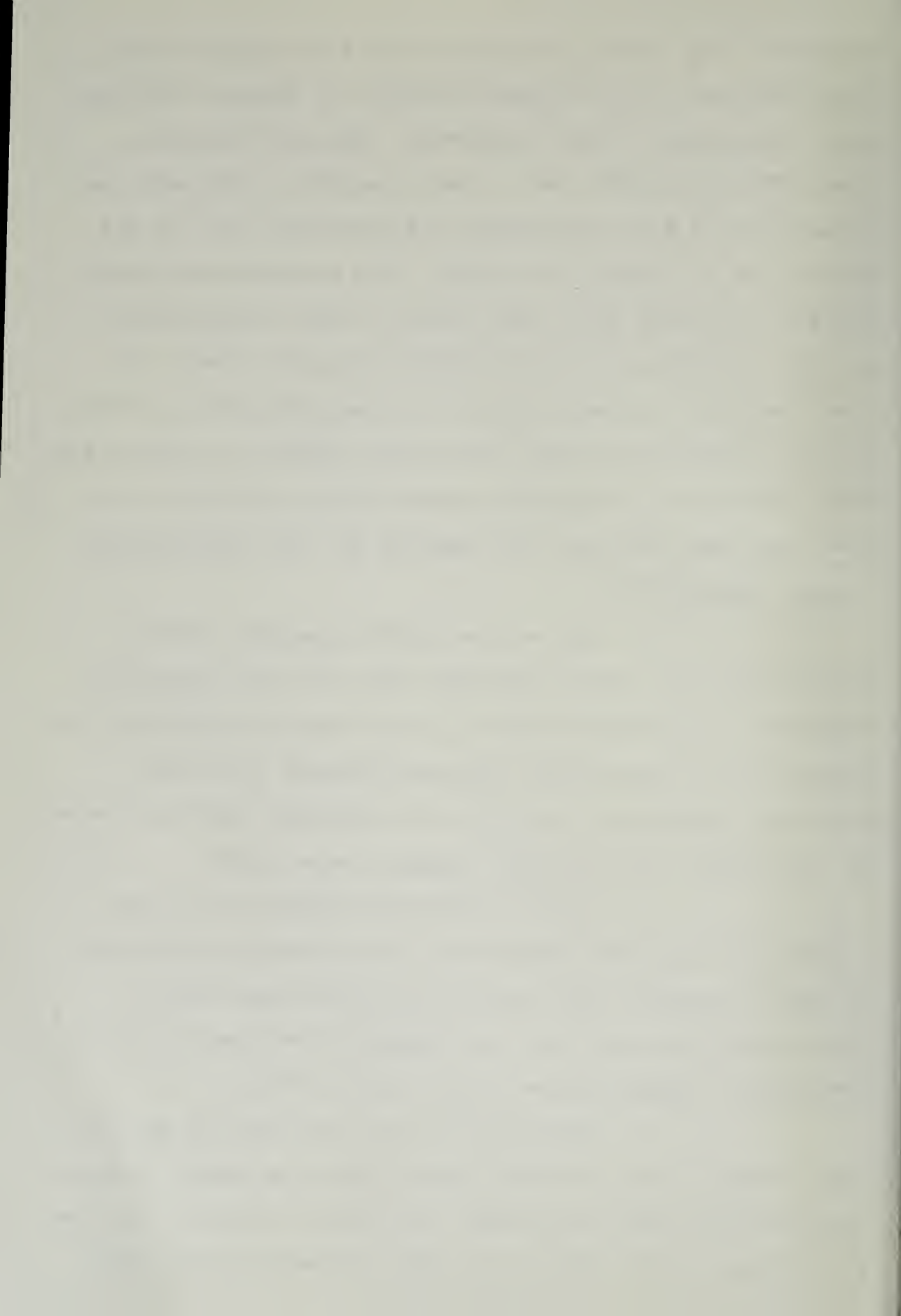


maintained list prices as of the time of the filing of the first complaint, and allocated millions of dollars for newspaper advertising of their products. They and their San Francisco distributors had a common purpose to maintain the advertising of major appliances and television sets in the market area at retail list prices: The manufacturers established list prices which were given to their distributors, and the distributors then published list price sheets for their retailer customers based on the manufacturer's prices; and the distributors based advertising credits to retailers on their adherence to list price advertising, a practice which must have been known to, and approved by, the manufacturers. (Supra, pages 28-39).

h. Each of the vendor appellees and co-conspirators had common knowledge that the large furniture, department or appliance stores in San Francisco controlled the advertising of these major consumer products in the San Francisco newspapers, and that such retailers advertised based on the vendors' list prices. (Supra, pages 30-32).

i. U.S.E.'s repeated requests to the two morning San Francisco newspapers to be allowed to advertise in their newspapers were denied, at a time when the co-conspirator retailers were the dominant advertisers in such newspapers. (Supra, pages 43-44, 52-54, 69-71).

j. Manfree (or U.S.E.) was not the only discount store in San Francisco County unable to obtain the leading brands of such merchandise. The other discount store then in existence in San Francisco, "GET" (Lakeshore Furniture),



was also unable to obtain such products. (Supra, page 71).

k. However, while appellants and GET, in San Francisco, (where the retail store defendants had their key stores and were key city advertisers) were subjected to the boycott shown here, some of the vendor conspirators were readily selling major appliances and television sets to other "discount stores", situated in San Jose, and in Oakland (after Hale closed its San Francisco appliance store operations in 1963). (See P. Ex. No. 5077(A-D); Tr. 3199-3202; Pl. Ex. for Id. Nos. 4079, 4080, 4082, 4083, 4084, 4085, 4108, 4266 and 5052)

l. Existence of special and discriminating terms in the purchase of, and advertising of, major appliances and television sets was established, by direct evidence, between such vendors and Hale, and four other local retailers of major appliance and television sets. They received the bulk of "special" advertising dollars from such vendors and therefore were the key advertisers of such products in the San Francisco newspapers. (Supra, pages 37-41, 69).

m. The officers and other representatives of the appellees and co-conspirator distributors, and Hale and other major San Francisco retailers, met and worked together as a group in San Francisco County in a number of enterprises. (Supra, pages 62-64).

n. Just prior to the filing of appellants' first complaint in August, 1960 a representative of co-conspirator Sterling arranged a meeting with an officer of the San Francisco News Call Bulletin to protest about U.S.E.





being able to advertise in that paper. Lachman Bros. refused to advertise in the News Call Bulletin because it allowed U.S.E. to advertise. Hale had limited its advertising in this paper in 1959. (Supra, pages 70-71).

B. The Court Refused To Apply Well-Established Legal Principles Concerning Evidence Of Concert Of Action By Those Accused Of Unreasonable Restraints Of Trade, To The Facts Of This Case:

1. It is respectfully submitted that the decision of the District Court is in clear conflict with four basic, well-established principles of antitrust boycott law which compel the submission of this case to a jury, as follows:

a. The proof of parallel and common refusals to deal by competitors against one qualified to compete requires the submittal of the evidence of the refusals to deal to the jury, for its determination of whether or not there existed a concert of action. An express agreement to refuse to deal is not required. Girardi vs. Gates Rubber Company Sales Division, Inc., 325 F.2d 196 (9th Cir. 1963) at 200 (see authorities cited there in footnote 9); United States vs. General Motors Corp., 384 U.S. 127, 142-143 (1966). Liability under the antitrust laws is based on the effect of restraints on the market place, and the showing here was that Manfree was completely excluded from the major appliance and television retail market by appellees. United States vs. Arnold, Schwinn & Co., 87 S.Ct. 1856, 1863 (1967); Interstate Circuit, Inc. vs. United States, 306 U.S. 208, 221 (1939); American Tobacco Co. vs. United States, 328 U.S. 781 (1946); Theatre Enterprises vs. Paramount Film D. Corp., supra, at 540-541. This Court



stated, in Standard Oil Co. of California vs. Moore, supra, at 210-211:

"Part of the evidence, as previously noted, concerned asserted instances of parallel action knowingly taken, rather than actual contracts and communications between appellants. Consciously parallel business behavior in matters touching prices and competition does not itself constitute a Sherman Act offense. It is, however, admissible circumstantial evidence of an underlying agreement, combination, or conspiracy concerning such matters. The probative value of such evidence is to be determined by the trier of the facts. Theatre Enterprises, Inc. vs. Paramount Film Distributing Corp., 346 U.S. 537, 540-541, 74 S.Ct. 257, 98 L.Ed. 273." (Emphasis added.)

b. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which if carried out, is in restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act. Interstate Circuit, Inc. vs. United States, 306 U.S. 208, 226-227 (1939); United States vs. General Motors Corp., 384 U.S. 127, 142-145 (1966).

c. Uniformity in refusing to sell, as a matter of policy, to a type of operation such as a "discount" store, forms the basis of permissible inference of joint action. Milgram vs. Loew's, Inc., 192 F.2d 579, 583 (3rd Cir. 1951).

d. Circumstantial evidence of concert of action is sufficient to overcome testimony by interested or biased witnesses denying the existence of an agreement. Such circumstantial evidence requires that the facts be submitted to the trier of fact for decision. This is especially the



case when those witnesses offering the contrary direct evidence, have been impeached. Girardi vs. Gates Rubber Co. Sales Division, Inc. 325 F.2d 196, 202-203 (9th Cir. 1963).

This Court stated in the Girardi case, at page 202:

"It is plain that the jury were not obliged to accept as true the testimony last quoted or Oranges' assertion that he neither asked that Gates do something about Girardi's price cutting nor requested them to cancel Girardi's contracts. This is particularly true in view of Oranges' interest. If, as they might well do, the jury were to discount as untrue these assertions, the remaining evidence is sufficient to support an inference that Oranges did just the opposite--that he did suggest and request that Gates take the action which it did against Girardi."

The failure to apply the law of conspiracy summarized above to virtually undisputed facts, has had the demonstrated effect of allowing appellee and co-conspirator vendors to boycott discount stores in San Francisco. Discount stores have achieved their prominence in the retail merchandising field as "price-cutters," and thereby the obvious purpose of the boycott was to prevent price competition from discount stores. Such a boycott is clearly a means of enforcing price fixing at the retail level. This type of judicial failure was the subject of reversal in United States vs. General Motors Corp., supra. It is respectfully submitted that the Trial Court here committed the same type of clear error in non-suiting the appellants, as did the trial court in the General Motors case.

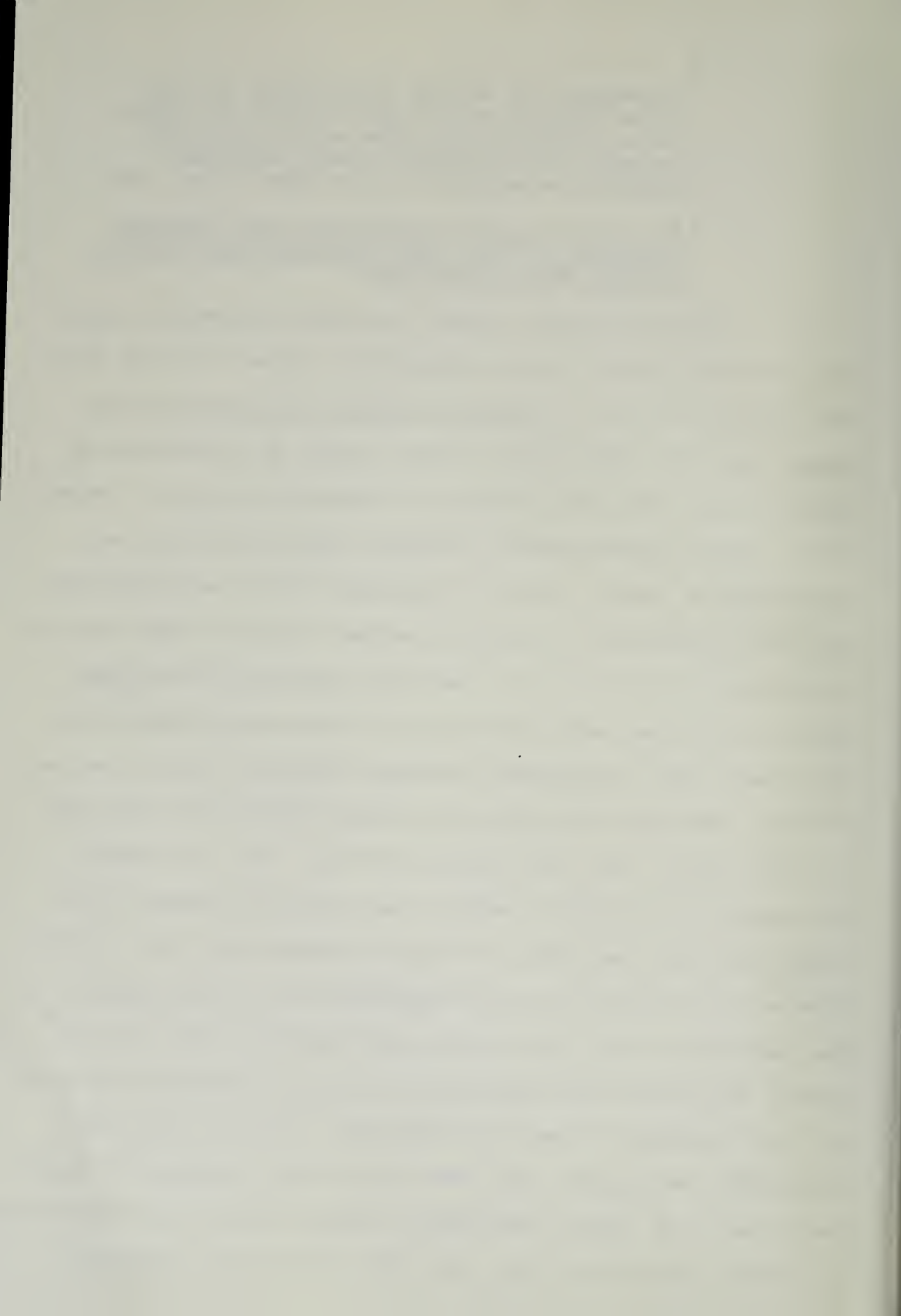




UNIFORMITY OF ACTION IN REFUSING TO SELL TO AN OTHERWISE SUCCESSFUL DISCOUNT STORE, UNDER CIRCUMSTANCES FROM WHICH THE TRIER OF FACT CAN REASONABLY INFER AGREEMENT, REQUIRES SUBMISSION OF THE CASE TO THE JURY

A. The Appellees Who Manufacture The Products Involved In This Case Admitted Their Refusal To Deal With Appellants:

As to the first claimed erroneous refusal to apply the law to the facts, it is respectfully urged that the decision of this Circuit in Standard Oil Co. of California vs. Moore, 251 F.2d 188 (9th Cir. 1957), held, on fundamentally similar facts, that the showing of refusals to deal by competitors, and of circumstantial evidence indicating that such vendors had a common motive to restrain trade, was sufficient to allow a plaintiff to recover judgment against those parties so refusing to sell to it. The first portion of the Moore opinion held that mere assertions by employees of defendants that there were "independent business reasons" for the refusal to deal, were not sufficient to justify taking the case away from the jury. (Id. at p. 206, 210-211). Yet, throughout the opinion of the Court below, there clearly appears a reliance upon the testimony of those witnesses who were, or had been at the time of the acts complained of, on the payrolls of the vendors of major appliances and television sets, to the effect that they were exercising individual business judgment in their refusals to sell to appellees: R.C.A., (R. 1923, 1925-1926); Whirlpool, (R. 1929; 1932-1933); Maytag and Maytag West Coast, (R. 1936, 1937-1938); General Motors and Frigidaire, (R. 1942, 1944-1945); G.E., (R. 1952, 1953-1955); Hotpoint,

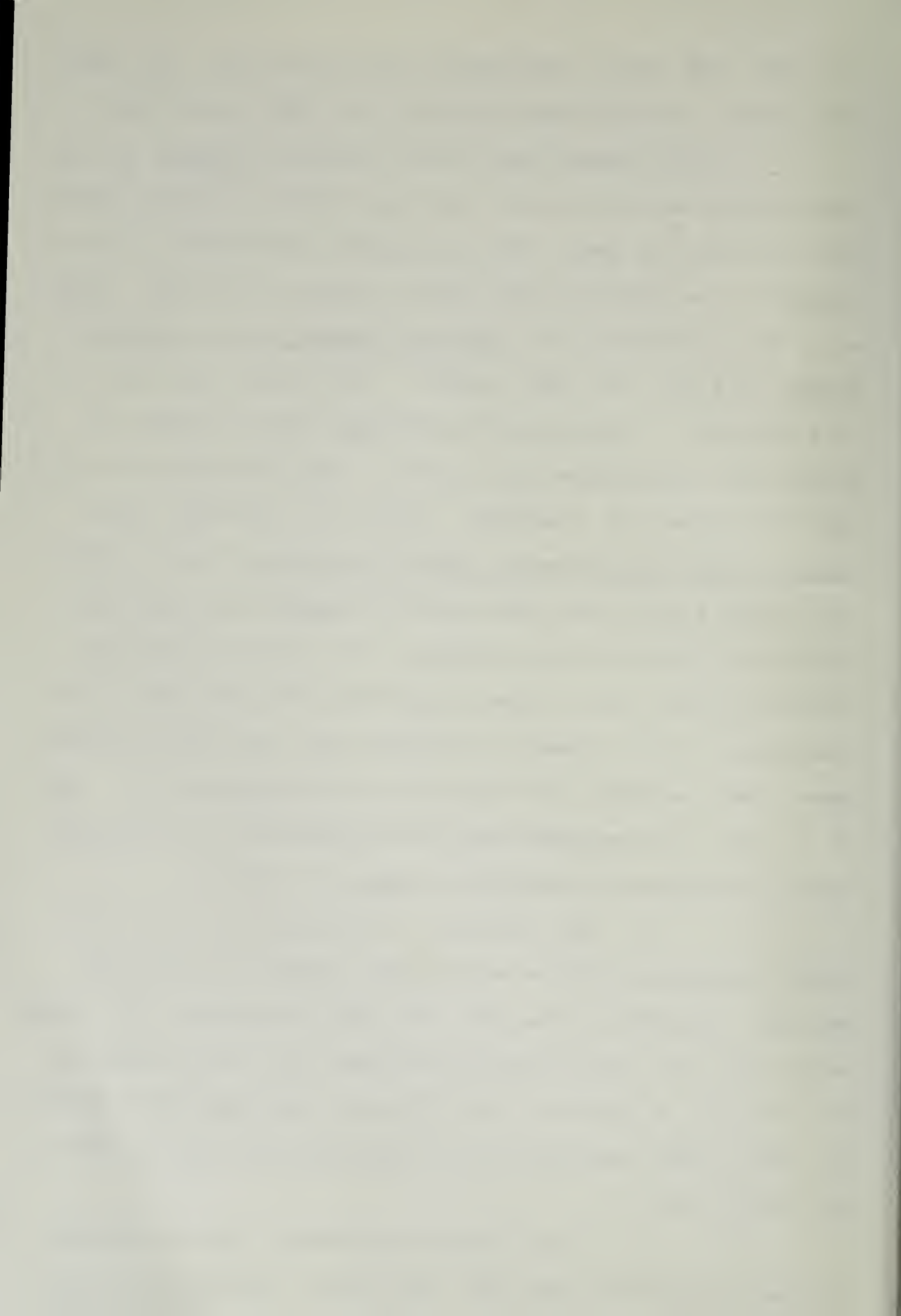


(R. 1957, 1959-1960); Borg-Warner and Norge Sales, (R. 1962, 1963-1964); and California Electric, (R. 1972, 1973-1975).

In the second part of the opinion in Moore, it was specifically held plaintiffs need not prove an express agreement to refuse to deal, that an unlawful combination or conspiracy to be found to exist from a concert of action. (Id. at p. 210, 211-212). (See American Tobacco Co. vs. United States, 328 U.S. 781, 809 (1946).) This Court held that it is sufficient if persons with knowledge that a concert of action was contemplated and invited, "gave adherence to and then participate in a scheme". (Id. at p. 211-212). (See Federal Trade Commission vs. Cement Institute, 333 U.S. 683, 716 (1948).) This Court then found in Moore that there was sufficient circumstantial evidence for a jury to conclude (although there was no direct proof that they had met to discuss Moore, in an attempt to boycott him) that the defendants were liable to Moore for violations of the Sherman Act. (Id. at p. 212). The evidence here fits precisely into the categories of evidence discussed in Moore, as follows:

a. The evidence is uncontradicted that the vendor appellees and co-conspirators refused to deal with Manfree: California Electric, Tr. 3765; Frigidaire, Tr. 4039, 4221; G.E., Tr. 4154; Maytag West Coast, Tr. 3352; Hotpoint, Tr. 3170; A. H. Meyer Co. (as to R.C.A. and Whirlpool products), Tr. 4921, 4994; Lancaster (as to Motorola and Norge products), Tr. 2614, 2615.

b. Also, Manfree requested, and was refused, Sylvania television sets (Tr. 5823-5825); Westinghouse major



appliances (Tr. 5910, 5915-5920); Zenith products (Tr. 5593-5595; 5907-5910); and Motorola products (Tr. 5886-5888).

Indeed, the appellee manufacturers all have admitted that they have continually refused to sell major appliances and television sets to Manfree. (Supra, pages 54-62, 67-69, 74-76).

c. R.C.A. and Whirlpool attempted to defend their refusals to deal on the ground that their products were distributed in Northern California by co-conspirator Meyer as an independent party acting completely without influence or control from these manufacturers. The Court below seemingly determined that such a defense was sufficient to overcome appellants' evidence which showed: (1) three parties were involved in list price advertising and tagging; the manufacturer who supplies the list prices and advertising funds, the distributor who fills in the forms, and the retailer who advertises at list and obtains the funds; (2) that the distribution contracts contemplated the freedom of these manufacturers to sell directly to retailers in San Francisco County (Pl. Ex. Nos. 88-I (Tr. 1200); 102, 103); (3) these appellees had the motive and purpose to maintain their own (factory) list prices as the retail list prices in San Francisco County; and (4) that these companies had factory representatives in San Francisco County who were in constant communication with retailers of R.C.A. television and Whirlpool appliances. (Supra, pages 28-30, 35-36; Tr. 4682-4686, 4693-4700, 4724-4727, 4732-4735, 4745-4746, 4751, 4761-4764, 4766, 4768-4769, 5017-5021, 5024-5027, 5032-5034, 5037-5048, 5053-5054, 5060-5061, 5119-5127, 5136-5142). It is reasonable to conclude that these appellees,



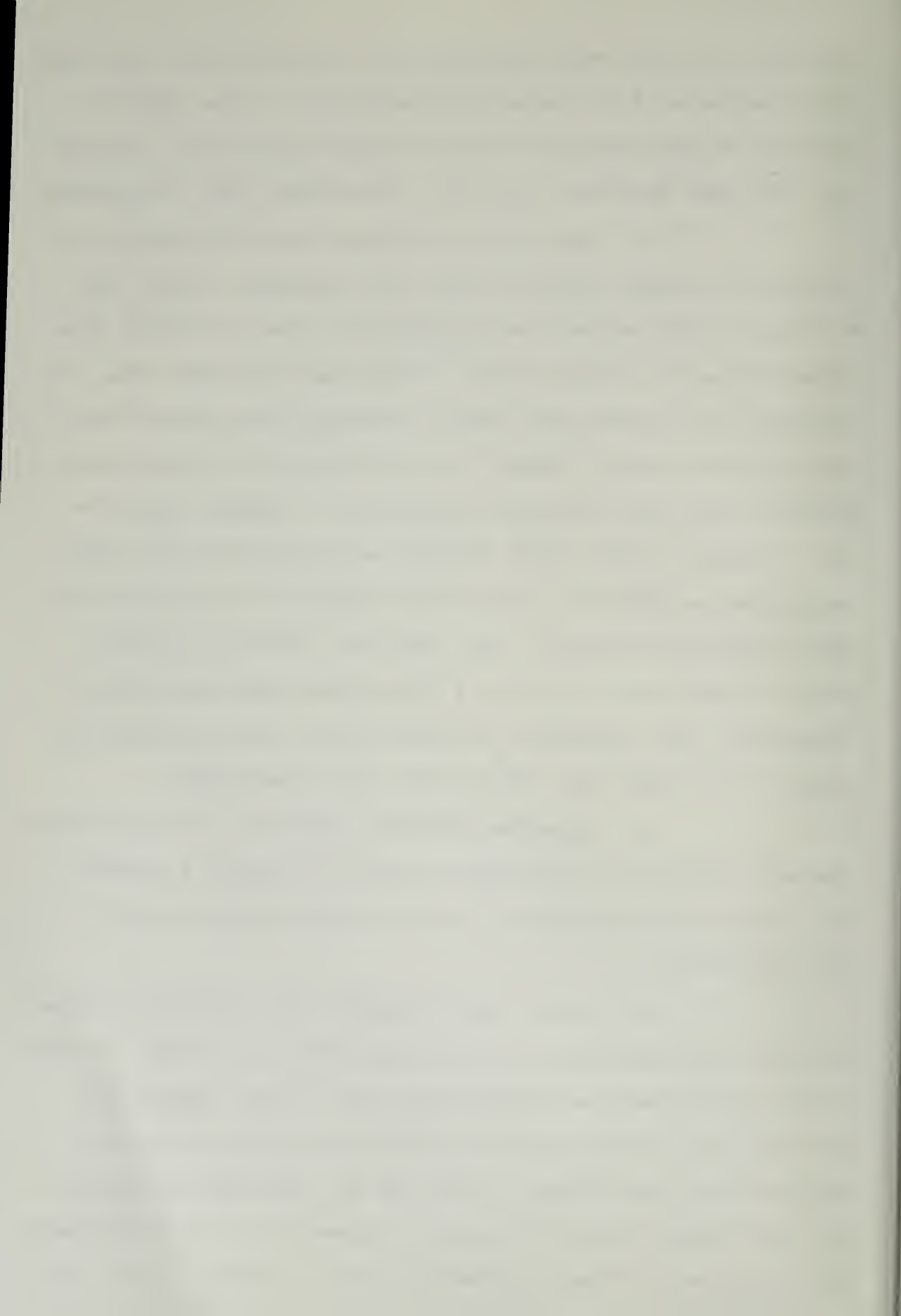


by reason of these many contacts and communications, had thorough knowledge of all aspects of marketing of the subject products in San Francisco County during the relevant period. (Tr. 555-558; 571-575; 1215-1217, 1307-1308; 4720, 4732-4736).

d. There was convincing proof of special arrangements between retailer Hale, and appellees R.C.A. and Whirlpool. The evidence was substantial that Whirlpool considered Hale its "key account" in the San Francisco area, and therefore it allowed Hale special factory advertising funds, and provided special models, so that Hale could extensively advertise and sell Whirlpool appliances. (Supra, pages 39-40). Further, R.C.A. held special meetings with Hale representatives in order to assist that company in maintaining its 30% to 40% price margin. (Tr. 188-210, 222-224, 231-275). Hale's advertising of R.C.A.'s television sets under Hale's "signature" was extensive, of which R.C.A. had knowledge by reason of its Form No. 226 (Pl. Ex. Nos. 1842-1846).

e. Appellee Whirlpool sold its "Coldspot" and "Kenmore" brands of appliances directly to Sears & Roebuck Co., which maintained retail stores in the market area. (Tr. 5051-5052).

f. R.C.A. also defended its continued refusal to deal with appellants on the ground that it did not receive a copy of the Manfree letter dated June, 1960, requesting product lines, sent to all manufacturers whose products appellant could not obtain. (But see Tr. 5598-5601 concerning the 1960 demand letter to Meyer). However, it is indisputable that appellants' first complaint, filed in August, 1960, and



clearly alleging a conspiracy to boycott, was served upon this appellee; but R.C.A. continued its refusal to sell television sets to Manfree. Certainly the fact that appellee was sued under the antitrust laws by one seeking to obtain its products does not give R.C.A. legal "justification" to refuse to deal (nor any other vendor appellee). See Bergen Drug Company vs. Parke, Davis & Company, 307 F.2d 725 (1962).

g. R.C.A.'s Southern California selling arm (R.C.A. Victor Distributing Corporation") also refused to sell to Manfree (Pl. Ex. for Id. No. 1702).

h. The record is clear that R.C.A. continued to refuse to sell its television sets to Manfree despite appellant's lawsuit, and its written requests of 1961 and 1963 (Pl. Ex. Nos. 1692, 1698, and 1701).

i. The remaining factory appellees who claim insulation from liability by reason of their distribution agreements with so-called "independent distributors" in Northern California are Borg-Warner (Norge Division), and Hotpoint. As to Borg-Warner, the record is uncontradicted that the requests of Mr. Bert Green in 1959 to obtain Norge appliances for appellants directly from appellee Norge Sales were refused by Mr. Harold Bull, Norge Sales' vice-president. (Pl. Ex. No. 4035). Mr. Bull called a meeting of representatives of Lancaster and Graybar, Norge distributors. At that meeting and in his presence, Mr. Gil Freeman of Lancaster requested Mr. Bonnet of Graybar, Los Angeles, to stop transshipments from that area to U.S.E. (Tr. 2592). Shipments were stopped thereafter (Tr. 5510, 5515-5519).



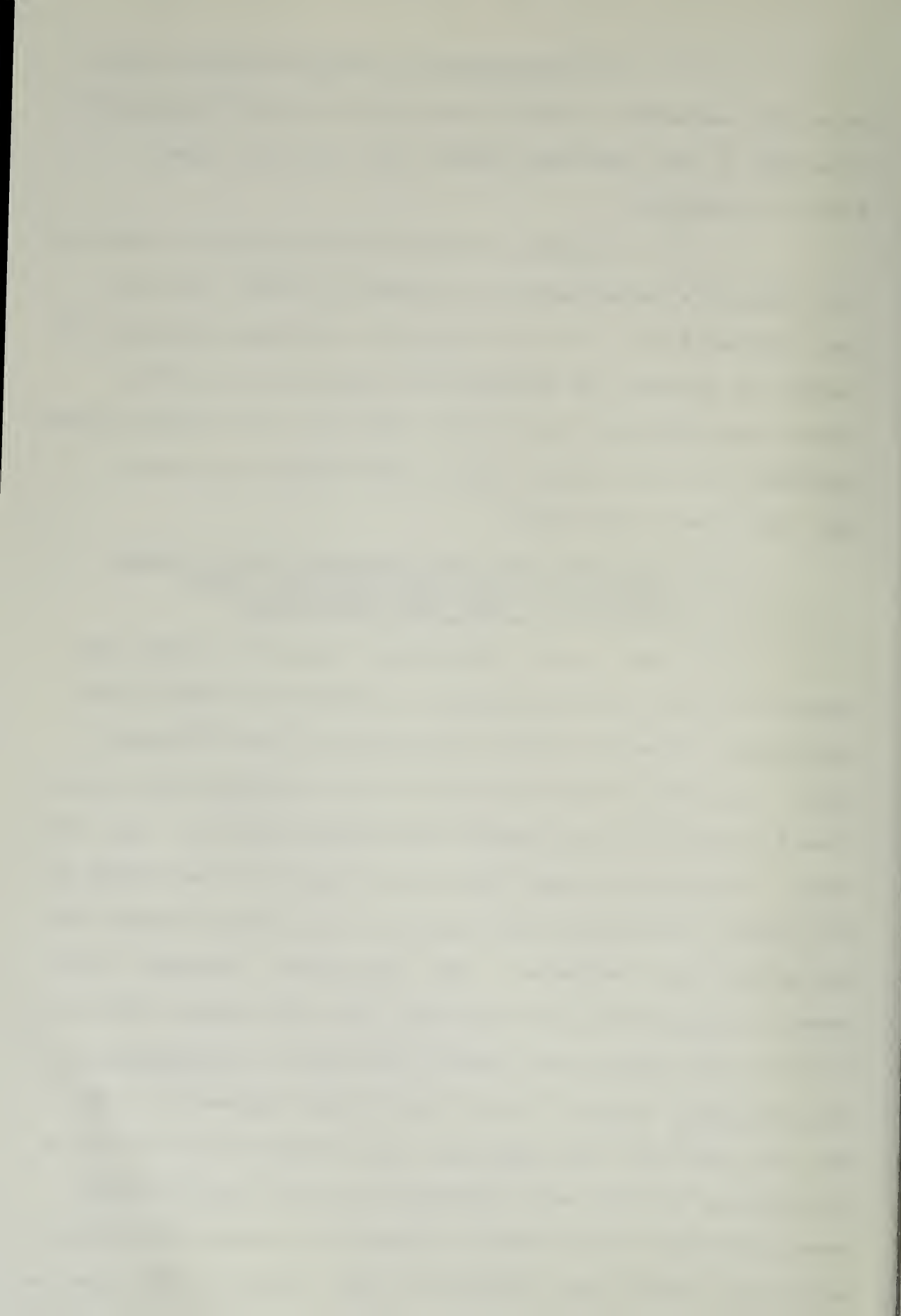
j. The distribution contract between Norge Sales and Lancaster allowed Norge Sales to sell directly to retailers in San Francisco County (Pl. Ex. Nos. 46A-B, 47A-B, and 48A-B).

k. Hotpoint received notification of distributor Graybar's cancellation of Manfree in 1958. (Pl. Ex. Nos. 525 and 536C). It was customary for representatives of Graybar to discuss the question of franchising discount stores with Hotpoint (Pl. Ex. No. 482) and for Hotpoint sales personnel to visit retail stores with Graybar personnel. (Tr. 3246-3248; 3254-3257).

B. The Appellees Who Distributed The Products Involved In This Case Admitted Their Refusals To Deal With Appellants:

1. Each of the distributor appellees admits its refusal to sell major appliances or television sets to the appellants, sometime during the period of 1957 to August, 1960. California Electric asserted as a defense that Manfree itself chose not to buy Philco appliances from it. (Tr. 3960-3966). Maytag West Coast claimed that part of the reason for its refusal to deal was the dislike of its sales manager for one of Manfree's salesmen. (Tr. 3375-3377). However, these several explanations are precisely like the defense offered by Union Oil Company and General Petroleum in Standard Oil Co. vs. Moore, supra. There, the evidence showed, as here was the case with this appellee, that despite the claim of a willingness to deal and a refusal to buy by the plaintiff, when confronted with a written demand to purchase the defendants there nonetheless refused to sell. Here in 1960 appellants





sent letters to California Electric unequivocally requesting products, and it is uncontroverted that California Electric categorically refused to sell Philco appliances to Manfree (Tr. 5778-5779). In addition, the testimony by Mr. Freeman of Manfree of being told by Mr. Muntain of California Electric that the latter would no longer be able to sell to Manfree because of pressure from other stores (Tr. 5735-5737), is completely contradictory to appellee's proffered "excuse" for refusing to deal. It is to be further noted that the fact that California Electric made a motion to dismiss and for a directed verdict, without placing Mr. Joseph Valenson, its General Sales Manager at the time the events took place, on the witness stand, raises the inference that testimony of Mr. Valenson would be adverse on the question of why appellee refused to deal. Cf. Calif. Ev. Code §§ 412, 413; Interstate Circuit, Inc. vs. United States, 306 U.S. 208, 225-226 (1938). This inference is especially pertinent in view of the extended offers of proof by appellants of evidence to the effect that Mr. Valenson had admitted to Mr. Freeman that, among other things damaging to appellee, Mr. Muntain of appellee had given false testimony in his deposition concerning his company's reasons for refusing to sell to appellant. (Tr. 5859-5863; see 3967-3971).

The evidence is uncontradicted that after appellee California Electric pulled the Philco line from Manfree in 1958, appellant never could acquire the Philco line from that appellee, despite repeated efforts to do so. (Supra, pages 55-56).



Maytag West Coast's asserted reason had a significant and singular late birth: In the deposition taken before trial of Mr. Mitchel, appellee's sales manager, who at trial claimed an aversion to Manfree's salesman, this witness made absolutely no mention of such factors having any bearing on his company's refusal to sell. (Tr. 3414-3432).

Therefore, the evidence is overwhelming that there existed a refusal to sell the subject products to Manfree on the part of appellee and co-conspirator vendors, unbroken over a long period of time. Thus appellants' proof on this point is entirely consonant with the first aspect of the Moore case.

2. With respect to the second aspect of the Moore opinion discussing evidence showing a concert of action, the evidence in this case is strikingly parallel. Moore showed a common purpose among the defendants to maintain retail prices, through discussions pertaining to retail prices between the vendor defendants and their retailers. Here, appellants showed a common purpose on the part of all appellees to maintain the list price of the particular distributor or factory, as the locally-advertised price of the products involved. It is manifest that a retailer will tag its merchandise on the floor at advertised price (or face enraged customers and perhaps the F.T.C.); the fact that it may eventually bargain and sell at a slightly different price in nowise negates evidence that a price-fixing conspiracy existed. To prove a price-fixing conspiracy, one need not show that prices were exactly uniform or the same, but only that a pricing formula was agreed to. United States vs. Socony Vacuum Oil Co.,



310 U.S. 150 (1940); Plymouth Dealers Association of Northern California vs. United States, 279 F.2d 128 (9th Cir. 1960).

Here the evidence showed that each vendor appellee promulgated suggested list prices based on factory list, and that they enforced the maintenance of these list prices by refusing to allow advertising fund credits to retailers unless their advertising was done at the list price. (Supra, pages 28-37). This program was one of enforcing adherence to list prices through the use of advertising funds supplied by the manufacturers, and of not selling to retailers who refused to tag their products at list prices. The evidence of such an express plan by the appellee and co-conspirator manufacturers and their distributors, that "cut" prices or "off-list" prices are not to be utilized in newspaper advertising, is striking and explicit evidence of an unlawful price-fixing agreement. It proves the existence and operation of a combination designed to accomplish the unlawful purpose of price-fixing. For under the rule established in United States vs. Parke, Davis & Co., 362 U.S. 29 (1960), a distributor may only announce its suggested prices and refuse to deal with a non-complying retailer. The enforcement of those prices through a coercive agreement by which advertising funds are utilized by the vendor to enforce prices is beyond the rule of the Parke, Davis & Co. case. United States vs. Arnold, Schwin & Co., 87 S.Ct. 1856 (1967); Lessig vs. Tidewater Oil Co., 327 F.2d 459, 463-464 (9th Cir. 1964). And so, of course, are concerted refusals to deal; United States v. General Motors Corp., supra.





3. This Court also noted in Moore that the evidence had shown that other price cutters were cut off by the defendant distributors. The evidence here shows that another discount store in San Francisco, "GET", (Lakeshore Furniture) was denied the product lines that were denied to appellants, by the same vendors. (Supra, page 71).

4. The Moore opinion also observed there was evidence of communications among defendants concerning supply, storage, marketing and pricing practices. The parallel evidence in this case is: The distributors followed a uniform practice of basing the allowance of cooperative advertising credits to retailers, upon the advertising of suggested list prices. (Supra). California Electric, Lancaster and Meyer invited representatives of each other to their trade shows. (Tr. 2816-2822). Mr. Gil Freeman of Lancaster called these companies "friendly competitors" (Tr. 2817). As in Moore where the defendant vendors uniformly allowed unpublished discounts to selected dealers, here the vendor appellees and co-conspirators treated Hale and the four other large retailer co-conspirators as "key" accounts, allowing them special price lists, or special product models, or special advertising funds. (Supra, pages 37-41). These vertical agreements of favoritism for certain retailers are directly contrary to Congressional policy clearly expressed in the Sherman Act, and the Robinson-Patman Act amendments to the Clayton Act, prohibiting the enlargement of business by means of special deals not fairly afforded to competitors. Such agreements are in fact clear evidence of unlawful plans for market



control. The Courts, it is respectfully urged, must give evidentiary significance to advertising and promotional programs which afford special funds to a single retailer, or a few selected retailers in a given area market (such as San Francisco), in view of this Congressional policy. These agreements create a power to control advertising in newspapers, and thus provide a ready means by which monopoly power is created and exercised. They further provide means by which the already-powerful retailer-advertiser, through its advertising and buying power in the market, can effectively coerce vendors to refuse to deal with competing vendors.

5. This Court in Moore commented upon the defendants' custom of exchanging their products. Here it was shown that the large San Francisco retailers entered into "accommodation" transfers between their stores, allowing them to acquire needed major appliances and television sets from each other. (Pl. Ex. Nos. 434, 435, 444, 445, 448).

6. The decision in Moore noted the defendants' uniform practice of obtaining clearance from each other before signing up new dealers. Similarly, appellants proved how the appellees and co-conspirators worked together in the following respects:

a. When a retailer seeks to purchase appliances, it is reported by the Credit Managers Association of Northern California, of which the distributors were members. (See Tr. 2582-2585; Pl. Ex. No. 551).

b. Hale customarily asked for special advertising consideration, informing the distributor in question



that it demanded such special considerations of all distributors who sold to it. (Pl. Ex. Nos. 798, 799, 800, 801, 802).

c. G.E., Maytag and R.C.A. required retailers to sign affidavits that they had engaged in no comparative price advertising. (Pl. Ex. Nos. 42, and 4372; Pl. for Id. No. 5068).

d. The practice of requiring retailers to report, under oath, the prices at which appliances are sold by them pursuant to a trade association's promotions, was followed and enforced by appellees G.E., Frigidaire, Hotpoint, and co-conspirators Sylvania, Graybar, Meyer, Basford, Redlick, Sterling, Lachman Bros., and Westinghouse. (Tr. 919-923; 933-935; Pl. Ex. No. 2090). This practice was carried on under the auspices of the Northern California Electrical Bureau (N.C.E.B.) of which the parties mentioned were members. N.C.E.B. also had a particular San Francisco unit of which Hale, Frigidaire, Meyer, Lancaster, Lachman Bros., Graybar, Westinghouse Appliance Sales, Sterling and Redlick were members. (See Tr. 1939-1944). California Electric was also a member of N.C.E.B. (See Tr. 3816-3817).

e. Retail co-conspirators Lachman, Redlick, Sterling, Macy's, and (upon occasion) Hale, were members of the San Francisco Better Business Bureau (B.B.B.), Home Furnishing Advisory Group, which held meetings in the late 1950's to establish a uniform code of advertising practices. Hale's representatives attended such gatherings. (See Tr. 3327-3333; 1583-1585). This group worked in unison to establish a "uniform advertising code" for San Francisco retailers,





and sought to enforce it. (See Pl. Ex. For Id. Nos. 384, 390, 391, 392-A, 393, 393(A,B), 400, and 453). Mr. Hobbs, the vice president of Hale, was a member of the Board of Directors of the B.B.B. and occasionally met with Mr. Lachman, president of competing Lachman Bros., at these Board of Directors meetings. (Tr. 1561-1565).

f. This Court commented in Moore about the significance of evidence showing that Moore was a "price-cutter", and the impact of this on a basically closed market. Appellants in the present case showed that Manfree sold major appliances and television sets at its cost, plus a mark-up of 20%. Hale could not meet these prices, and therefore, as the evidence demonstrates, it instituted a campaign to increase margins or maintain margins of 30 to 40% above cost, in San Francisco. (See the testimony of Messrs. Hobbs and Sanford of Hale, concerning their trip to New York and Michigan. (Tr. 188-210, 222-224, 231-275; 510-518, 529-531, 555-567, 571-579, 587).) Manfree was ordered by appellee California Electric (who was selling it Philco products in 1957), not to advertise prices for Philco in the local newspaper that accepted appellants' ads. (Supra, page 44). The jury could reasonably conclude that Manfree would not agree to sell at the suggested list price, and that accordingly it was boycotted because of its pricing policy, as such policy would be fatal to the prevailing list price structure being maintained in San Francisco.

The trial court committed reversible error in not allowing evidence of this character to go to the jury. Reversal of the judgment is required because of the trial court's



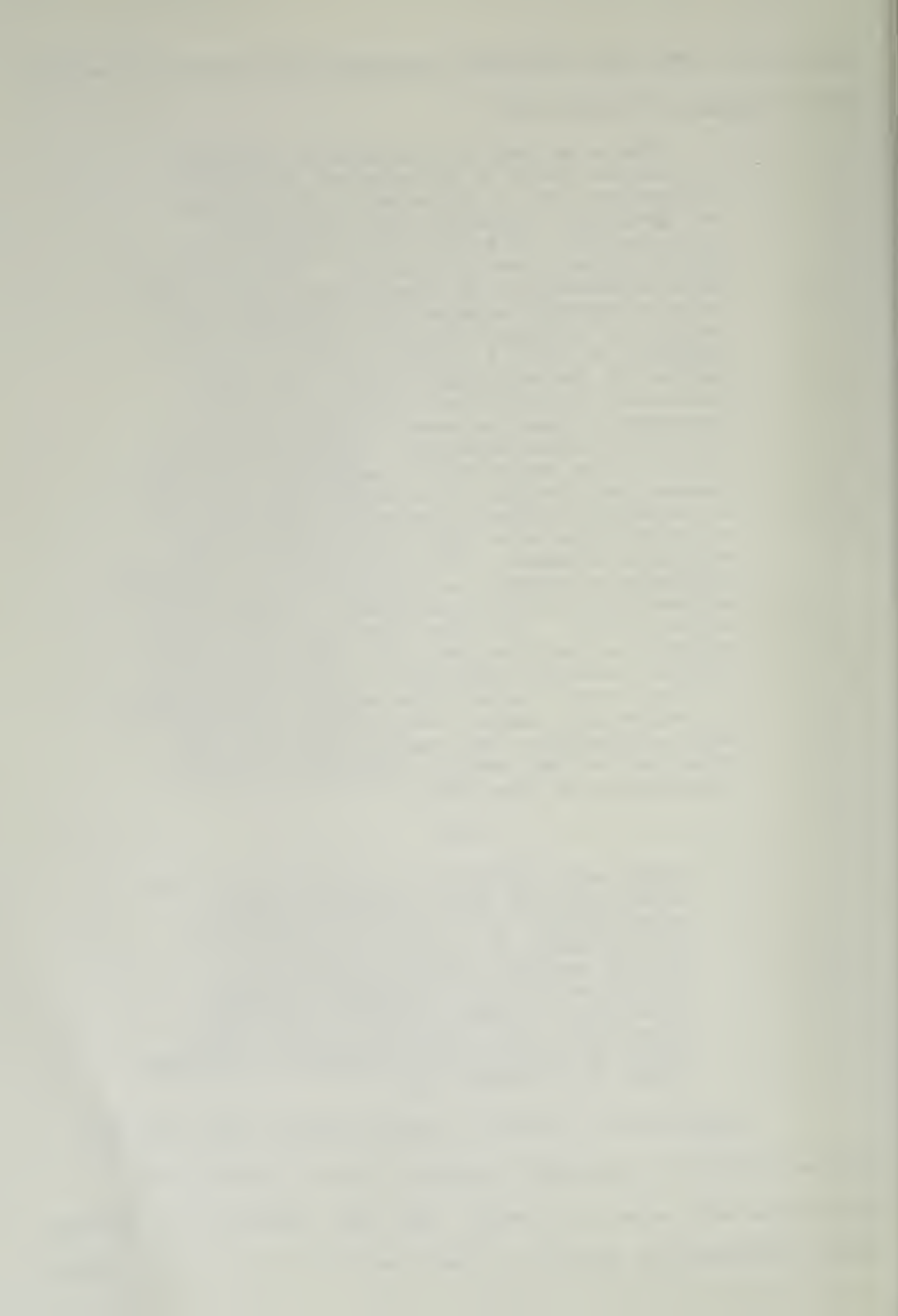
failure to apply the following standards laid down by the decision in Moore, at page 211:

"Where an act or practice of refusing to deal is shown to be pursuant to, or in furtherance of, an agreement, combination or conspiracy, Sherman Act liability is encountered. It is now well established, and it is not here questioned, that an agreement, combination or conspiracy between two or more persons engaged in interstate commerce, to withdraw or withhold custom from another, or with a class of others, is violative of the antitrust laws. Concerted restraint of this kind is illegal, even if intended to meet or overcome an admittedly invidious trade practice. Evidence tending to show that there was a legitimate business reason for the act of an individual merchant in refusing to deal is always admissible in contradiction of a case built upon circumstantial evidence. But if there is sufficient evidence to support a finding that a merchant entered into such an agreement, combination or conspiracy, the fact that his individual refusal to deal may be explainable as a reasonable business decision is not excusatory of liability. He will be deemed to have set in motion an illegal undertaking, and will be held accountable for damage caused by the overt act of any member, pursuant to or in furtherance of the plan."

### III

THERE WAS SUBSTANTIAL EVIDENCE THAT THE APPELLEES AND THEIR CO-CONSPIRATORS PARTICIPATED IN A PLAN, THE NECESSARY CONSEQUENCES OF WHICH IF CARRIED OUT, WAS TO PREVENT PRICE COMPETITION IN SAN FRANCISCO AND ELIMINATE DISCOUNT STORES AS SELLERS OF MAJOR HOUSEHOLD APPLIANCES AND TELEVISION SETS, SUFFICIENT TO ESTABLISH AN UNLAWFUL CONSPIRACY UNDER THE SHERMAN ACT.

Appellants' evidence clearly showed that discount stores provided a markedly different way to retail major appliances and television sets; that they ignored list prices; that a combination seeking to keep retailers in a given market

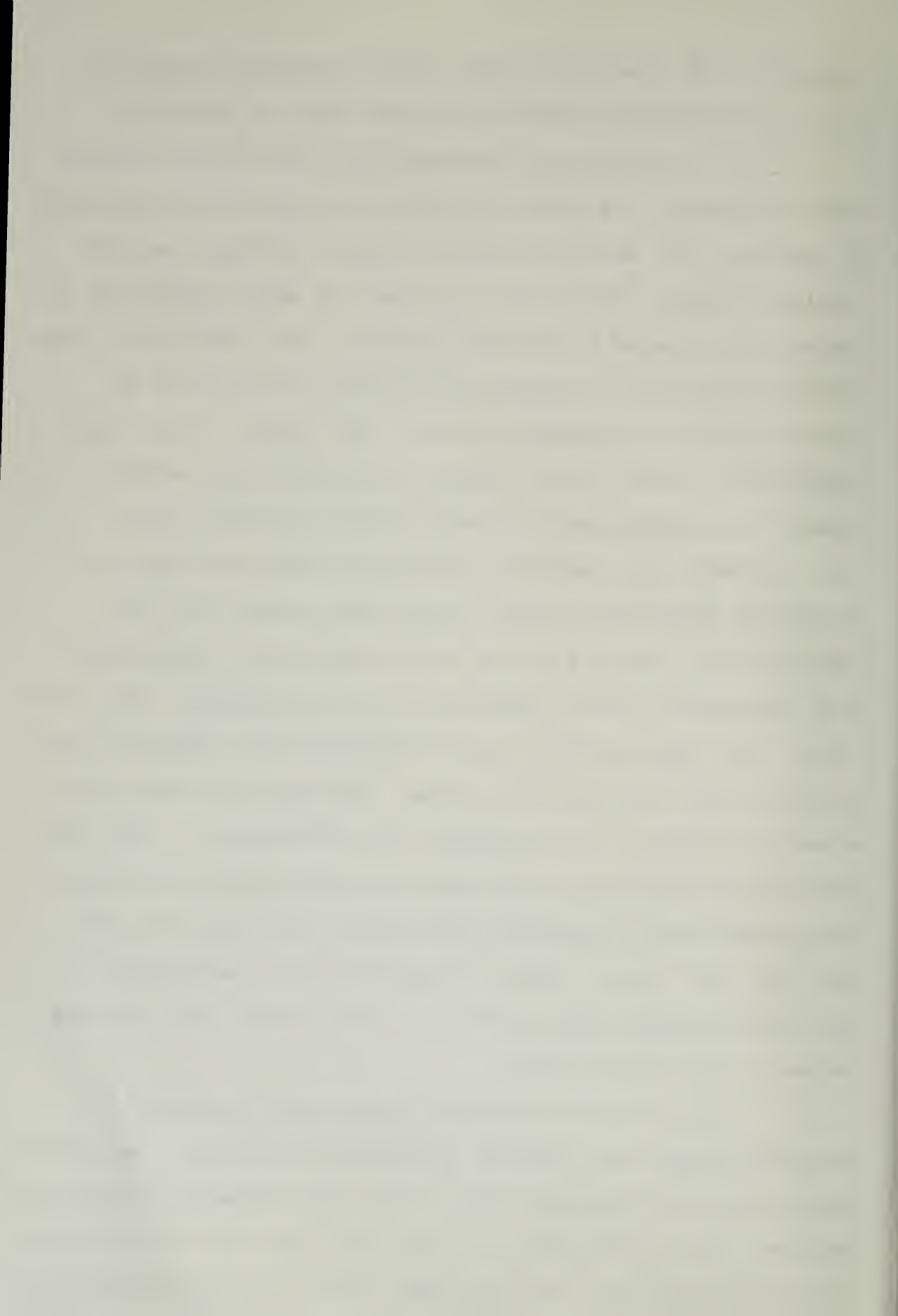


"tagging" such products at list prices would be threatened (and would recognize such) by this new type of retailing.

1. Evidence was presented that Hale took concrete steps to prevent and remove the type of competition threatened by Manfree: Mr. Sanford, General Manager of Hale, had discussions with Mr. Hurd, Vice President of Hale, concerning the competition created by discount stores. (Tr. 995-1014). They had discussions as to whether or not Hale should take on brands carried by discount stores. (Tr. 1002). U.S.E. was specifically known to Mr. Sanford, and he cut out and discussed its advertisements showing prices, with Mr. Hurd. (Tr. 995-998). Mr. Sanford specifically admitted that he might have discussed whether or not Hale would carry the Hotpoint line, because it was being carried by "competitors", with representatives of Lancaster, the distributor. (Tr. 1343-1344). Mr. Hobbs and Mr. Sanford discussed the discount store situation and its impact on prices, deciding that Hale should attempt to obtain a price margin of a 40% mark-up. (Tr. 202). Hale attempted to tag major appliances and television sets at the manufacturer's suggested list price, (Tr. 210, 614, 603, 604, 858, 898, 1431, 1453), and promulgated a memorandum to its store managers stating that it would "beat" the discount houses. (Pl. Ex. No. 739).

2. As noted previous, Manfree was cancelled by Lancaster during this period, specifically the jury could find because Hale had demanded that it not sell Norge appliances to Manfree. (Tr. 1343-1345). At the time Hale did not advertise Norge appliances (Pl. Ex. No. 644); thus it may reasonably be



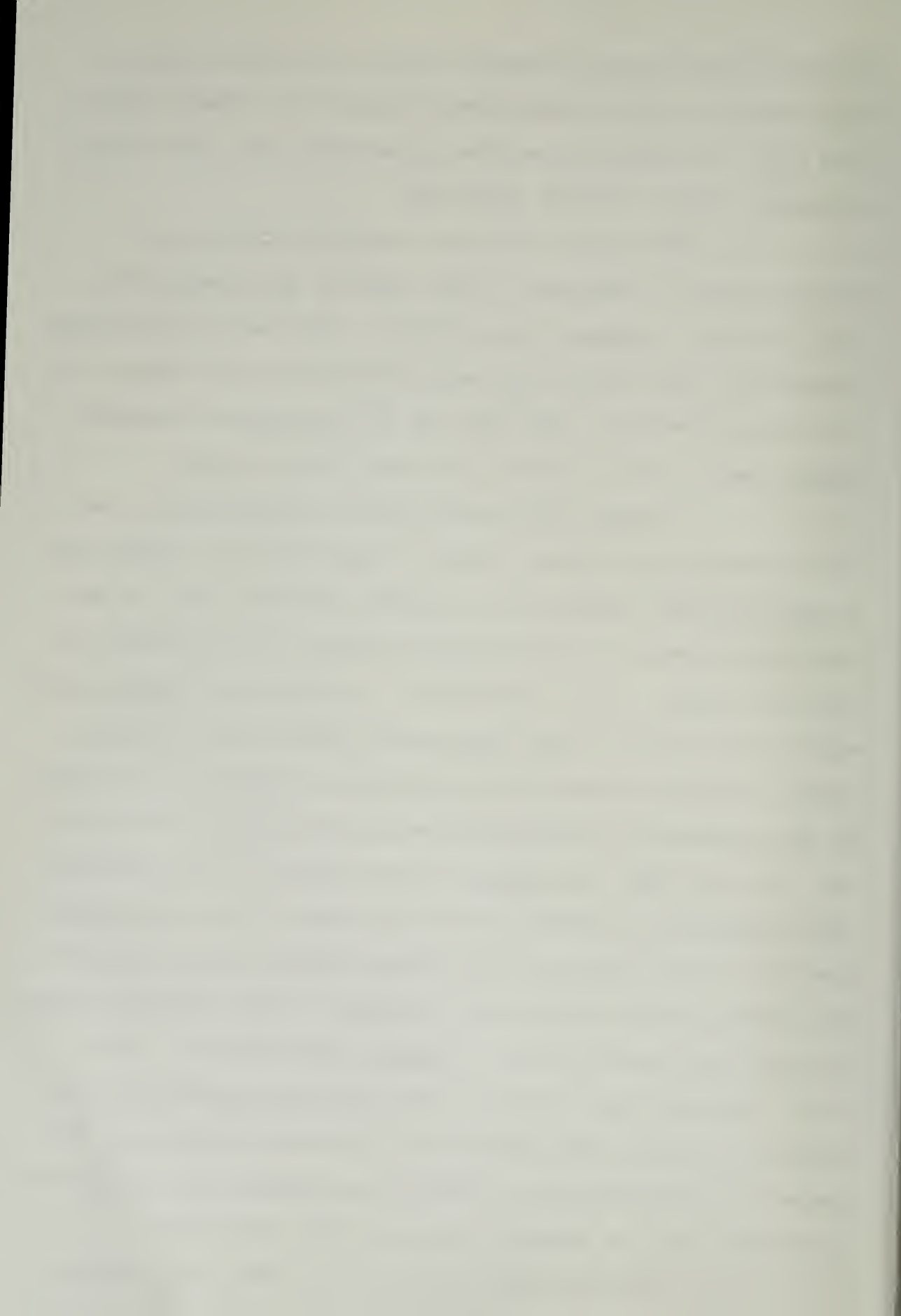


inferred that this was coercive action by a major retailer with important advertising power, designed to obtain compliance with its wish that Manfree be excluded from all sources of supply for the subject products.

3. California Electric cancelled Manfree as a Philco dealer in September, 1958, because of pressure from other dealers. (Supra, pages 43-44). Hale was an "associate distributor" for Philco, and was serviced in this category by California Electric. Hale was one of its biggest accounts. (Supra, pages 40-41, and Pl. Ex. Nos. there listed).

4. Graybar, the local Hotpoint distributor, cancelled Manfree in October, 1958, at which time Mr. Mayben of Graybar told Mr. Freeman that Graybar could not sell to the department stores in San Francisco County, while selling to discount stores. (Tr. 5797-5798). At this time, Graybar also adopted the policy, (also followed by other local distributors), of basing cooperative advertising credits to retailers on the suggested list prices promulgated by the distributor. (Pl. Ex. No. 339A; see supra at pages 32-33). While Manfree carried Hotpoint products, retailers such as co-conspirators Sterling, Hale, Redlick, and Lachman refused to buy Hotpoint; but shortly after Manfree was cancelled, these retailers began to carry the Hotpoint line. (Supra, pages 65-66). These "key" retailers were told at a San Francisco meeting held by Graybar to inform that Graybar had "changed its policy" with respect to distribution of Hotpoint appliances, and would not thereafter sell to discount stores. (Tr. 6120-6125).

5. Shortly prior to March 10, 1959, when Maytag



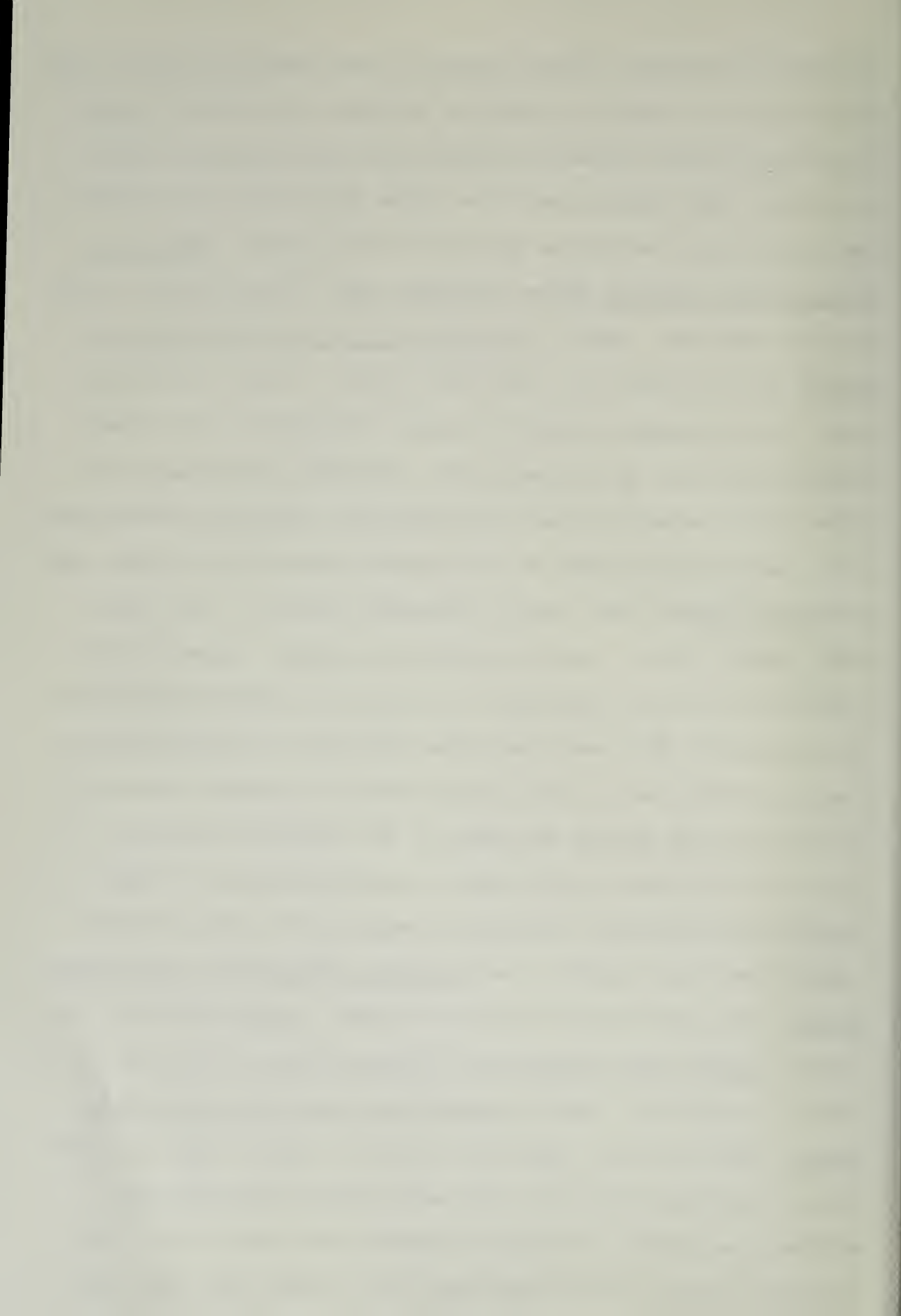
West Coast cancelled Manfree's dealership, Mr. Sanford of Hale and Mr. Mitchel of Maytag West Coast discussed the Maytag line for Hale's stores. Mr. Sanford admitted he inquired about Maytag's intentions concerning its then-existing dealer organization in San Francisco. (Tr. 1111). As has been pointed out, when Manfree was cancelled, Hale became a Maytag dealer and made a \$11,000.00 purchase order, and received a \$3,000.00 advertising credit from Maytag. (Supra, pages 46-47). As was the case with Hotpoint, while Manfree carried Maytag, Hale did not sell or advertise Maytag appliances, but after the cancellation of appellant, it became a leading dealer of Maytag (ibid.), as did co-conspirators Sterling and Lachman Bros. (Pl. Ex. Nos. 641, 4161, 313, 318; Tr. 3336-3337).

6. The evidence thus shows that co-conspirator Hale was a "key" retail account in San Francisco for the factory appellees Whirlpool, Borg-Warner, R.C.A., Maytag, and Philco (supra), and was a key advertiser for Frigidaire, G.E., and California Electric. (Pl. Ex. Nos. Frg: 237, 781, 4297, 937, 2070, 2059; G.E.: 708, 715, 712, 713; CESCO: 654, 655, 656, 1847-1898, 1369). Alone, or together with the other retailer defendants, it had the market power, and thus the authority to compel acceptance from the vendors of a plan to prevent the successful entry of discount stores into the San Francisco retail market for the subject goods. Each of the vendor appellees or co-conspirators, through their sales representatives, admitted to appellants that they could not sell to Manfree because of their existing dealer structure, or because of



pressure from Hale; direct evidence that discount stores could not be sold the subject products without the vendors facing the loss of their local big department and appliance store accounts. The inferences to be drawn from these statements rest within the exclusive province of the jury. Girardi vs. Gates Rubber Company Sales Division, Inc., 325 F.2d 196, 200, 202-204 (9th Cir. 1963); Standard Oil Co. of California vs. Moore, 251 F.2d 188, 210 (9th Cir. 1957). And, it is clear that the statements showed a concert of action, since they showed directly, or by reasonable inference, that Hale and other large retail stores (including the retailer co-conspirators) were clearly bent on eliminating competition in the San Francisco market from the new discount stores. (Tr. 1111, 5509, 5808, 5979). Taken together or singly, these various statements show the existence of a plan to boycott Manfree by co-conspirator Hale and the other retailers in San Francisco. The opportunity of all the conspirators to acquire knowledge of the plan was proven to exist in the various instances during the relevant period where representatives of these respective companies--"friendly competitors"--met and discussed the local market. See American Tobacco Co. vs. United States, 147 F.2d 93, 119 (6th Cir. 1944), aff'd 328 U.S. 781 (1946); Morton Salt Company vs. United States, 235 F.2d 573, 576-577 (10th Cir. 1956); Continental Baking Co. vs. United States, 281 F.2d 137, 151-152 (6th Cir. 1960). And, an additional essential point is that each vendor who cancelled Manfree, was shown to have had representatives who had "discussions" about market conditions with people from Hale and





other large local retailers, both prior to such cancellations and afterwards. (Ibid.)

The representatives of the vendors who never did sell to Manfree, such as G.E. (Tr. 5843); Frigidaire (Tr. 5829); and Meyer (Tr. 1217-1220, 5609), all testified that they believed that sales to Manfree would place their local dealer structureship in a precarious position. (Supra, pages 67-69). The boycott of Manfree was thus shown to have been achieved in a market where the retail defendants controlled advertising and maintained the list price as tag price. All appellees were shown to be aware of these practices.

This is not a case where products are in short supply (cf. Independent Iron Works vs. United States Steel Corp., 322 F.2d 656 (9th Cir. 1963), strongly relied upon by the Court below), but a case in which there was an abundant supply of major appliances and television sets, and in which the distributors and factories were planning and promulgating extensive sales programs, give-aways, and even paying salesmen cash bonuses (called "spiffs") to sell their products. (Tr. 4018-4020). Real competition in the market would have required the vendors, in the exercise of good business sense, to sell to stores like Manfree with a heavy volume of traffic and with the opportunity of selling in large quantities. (See Pl. Ex. for Id. No. 1500-1). Only a concert of restrictive action, not a free market condition, would prevent large discount stores from obtaining needed supplies of leading brands of such merchandise. As the Supreme Court noted in its recent opinion concerning a concerted boycott of discount



stores, in United States vs. General Motors Corp., 384 U.S. 127 (1966), at pages 427-428:

"There is in the record ample evidence that one of the purposes behind the concerted effort to eliminate sales of new Chevrolet cars by discounters was to protect franchised dealers from real or apparent price competition. The discounters advertised price savings . . . . Some purchasers found and others believed that discount prices were lower than those available through franchised dealers . . . . Certainly, complaints about price competition were prominent in the letters and telegrams with which the individual dealers and salesmen bombarded General Motors in November 1960. . . . And although the District Court found to the contrary, there is evidence in the record that General Motors itself was not unconcerned about the effect of discount sales upon general price levels.

"The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders." (Emphasis added.)

The vendors were clearly placed in a position of having to choose whether to sell to the large department and appliance stores at the expense of the discount stores, or to sell to the discount stores at the expense of the large department and appliance stores. The retail conspirators clearly demanded this alternative. Applying the law to the facts, then it is respectfully urged that the evidence was substantial, if not conclusive, to the effect that a plan to boycott Manfree existed and was successfully executed. Such a plan, and participation in it by appellees and co-conspirators, is of course an obvious restraint of trade. Klor's, Inc. vs. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959);



IV

THE ADMISSIONS BY REPRESENTATIVES OF APPELLEES THAT THEY REFUSED TO DEAL WITH APPELLANT MANFREE BECAUSE IT WAS A DISCOUNT STORE, IS IN ITSELF EVIDENCE SUFFICIENT TO GO TO THE JURY FOR IT TO DETERMINE IF THERE WAS AN UNLAWFUL CONSPIRACY.

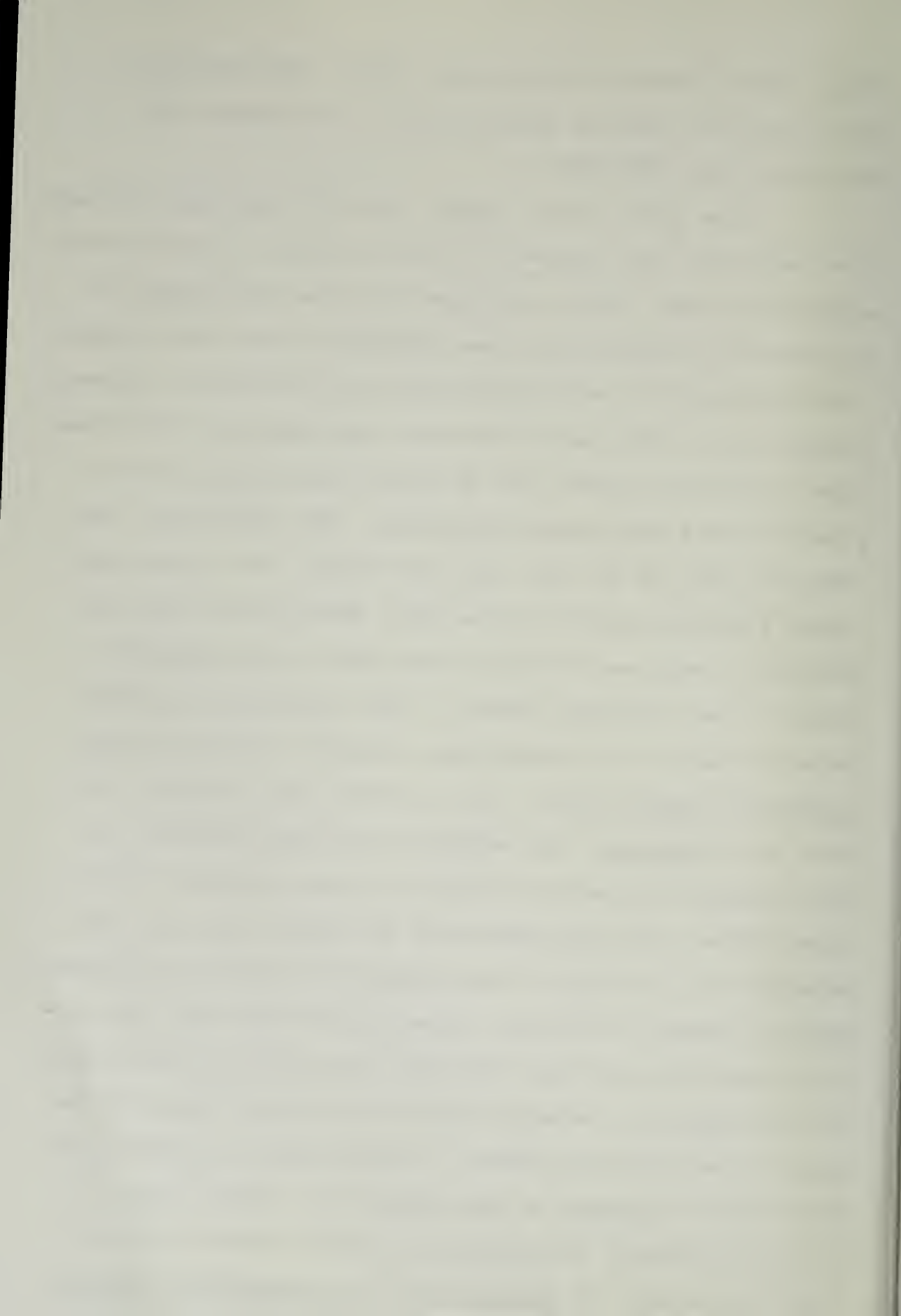
1. Maytag admitted that its decision not to sell to Manfree was based, at least in part, on the fact that it was a closed-door discount store. (Tr. 3379). Mr. Hamilton, Frigidaire's Sales Manager, told Mr. Freeman of Manfree that Frigidaire would not sell to discount stores, and that it would be a waste of time to have a Frigidaire representative call on Manfree. (Tr. 5825-5829). Mr. Lau, G.E. Sales Counselor, readily testified that he did not bring a blank franchise form when he called at U.S.E., because "it was management's decision in General Electric not to franchise a closed-door operation." (Tr. 5350-5354). G.E. did not sell to "closed-door" discount stores. (Tr. 5301-5302). The sales representatives of California Electric did not sell to discount stores after 1958 in the San Francisco area. (Pl. Ex. No. 792; Tr. 3765, 3782). Representatives of Meyer would not sell to discount stores in San Francisco, as discount store type advertising in the newspapers was against the express policy of Meyer of refusing to give cooperative advertising credit to any retailers who engaged in so-called "cut-price" advertising. (Pl. Ex. No. 1161; see supra, pages 35-36). Whirlpool deliberately maintained a high profit margin for retailers in San Francisco, at the request of its





"key" retail accounts (Pl. Ex. No. 4227). Borg-Warner's Norge Division directly participated in the boycott of Manfree. (Tr. 2590-2592).

The record shows (supra, page 71) that most of these same suppliers also refused to sell to another local discount store called GET. When considered with the plain proof of the boycott of Manfree by these suppliers, there was substantial evidence that each distributor put into effect a general program not to sell major household appliances and television sets to discount stores, but to limit those stores to supplies of small appliances and radios. (Tr. 5857-5859, 5863-5866; Pl. Ex. for Id. Nos. 5117 and 5118). The reasons advanced for this conduct by the local distributors were not peculiar to Manfree, but were applicable to all discount stores in San Francisco County. This uniformity of policy forms the basis of a permissible inference of joint action. Milgram vs. Loew's, Inc., 192 F.2d 579, 583 (3rd Cir. 1951). Here, as in Milgram, each supplier was acting against its best economic interests in refusing large potential orders from Manfree, who made absolutely no demands that any other retailers not be supplied the products it sought to purchase. Absent a concert of action, there was no reason why the public in San Francisco was deprived, as it was, of the benefits of the competition between discount stores and Hale and the other large appliance stores. A proclivity to unlawful conduct noted in Milgram is also noted here. Hale, R.C.A., G.E. and Whirlpool were before the United States Supreme Court in the case of Klor's, Inc. vs. Broadway-Hale Stores,

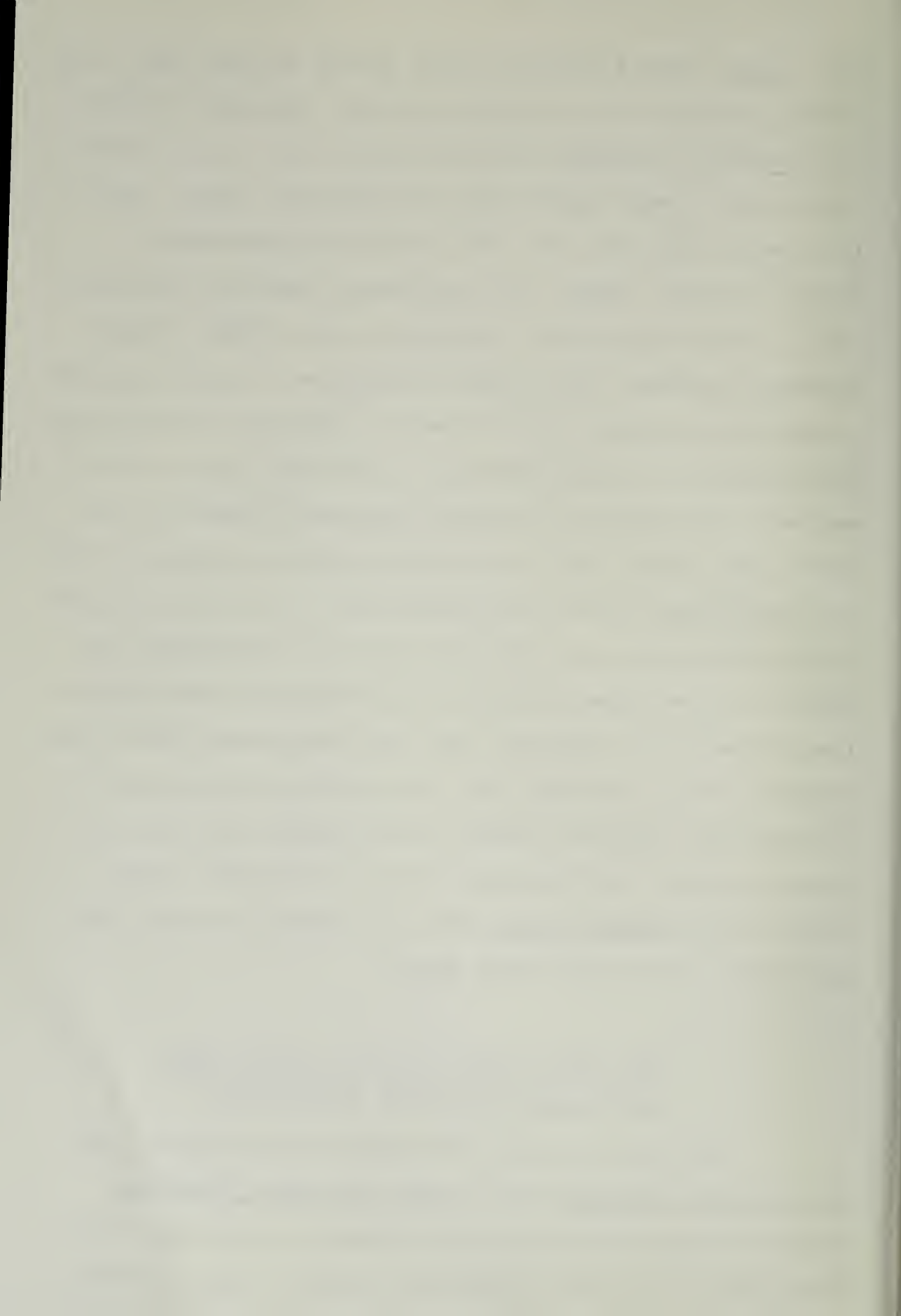


Inc., supra, upon affidavits which failed to deny that a conspiracy existed in San Francisco County, organized by Hale, and designed to exclude plaintiff Klor's, Inc. as an active competitor in major appliances and television sets. Also included in that suit were the present co-conspirators Basford, Philco, Zenith, and California Electric's predecessor as Philco distributor, Dallman Co. (Tr. 3934). These companies asserted their right to exercise a boycott against a competitor of Hale, at its demand. (Manfree was then also being deprived of such products, at the same time as Klor's was being subjected to a boycott apparently based on erroneous legal advice that such conduct against a single dealer was not unlawful under the Sherman Act.) It is thus respectfully asserted that the District Court in the present case failed to give proper judicial significance to the evidence (recognized in its opinion) that the distributors had in fact stated in trial testimony that their policy not to sell to "closed-door" discount houses was the reason for their refusals to deal. It therefore erred, as the trial court erred in the General Motors case, in failing to apply the applicable law to the proven facts.

V

THE COURT FAILED TO GIVE PROPER LEGAL SIGNIFICANCE TO PROOF THAT APPELLANTS WERE DENIED NEWSPAPER ADVERTISING.

The fact that the co-conspirator newspapers, the San Francisco Examiner and the San Francisco Chronicle, adopted common policies against allowing any discount store advertising, is further substantial proof of the existence



of a powerful combination to prevent competition from discount stores in the retailing of major appliances and television sets. The testimony of Mr. Mittelman, former advertising manager for U.S.E., admitted against all appellees, showing that appellants were unable to advertise in the San Francisco morning newspapers, is given no effect by the Trial Court. (R.1918-1920 ; supra, pages 52-53). But this is the very kind of circumstantial evidence which demonstrates the existence of a boycott conspiracy. Indeed the record shows that there was evidence that Hale as a leading local newspaper advertiser, applied pressure on The Examiner to refuse discount store advertising, but such evidence was stricken. (Borg-Warner Ex. No. 9024).

The circumstantial evidence of combined retail store pressure to prevent discount store newspaper advertising was substantial: Mr. Mittelman testified that Lachman would not advertise in the San Francisco Call-Bulletin because of U.S.E. advertising in that paper. (Tr. 2035-2046). Redlick did not advertise in the San Francisco Call-Bulletin, and Hale substantially reduced its advertising in the Call-Bulletin in 1959, when U.S.E. ads were being carried in that paper. (Tr. 332-333). Sterling, the only co-conspirator retailer then advertising in the Call-Bulletin, requested a meeting with the advertising director of the Call-Bulletin in 1960, to discuss U.S.E. advertising. During this time Sterling, Redlick, Lachman, Macy's and The Emporium were meeting at the B.B.B. to discuss a "uniform" advertising guide for San Francisco retail merchants. The witnesses who were present





at that meeting "could not recall" what was specifically discussed there. (Supra, pages 70-71). Nonetheless, it is highly probative of appellants' claims that the witnesses admitted attending such a meeting for the purpose described, in the context of the denial of advertising to U.S.E. at that time in the other two local newspapers, and the refusals to deal with Manfree by the vendors.

## VI

THE RECORD SHOWS THE IMPEACHMENT  
OF WITNESSES WHO CLAIMED THERE  
WAS NO CONSPIRACY.

It is clear that the trial court was presented with a record from which the trier of fact could choose to disbelieve the testimony of various interested witnesses who claimed there was no agreement among the defendants in refusing to sell to Manfree. In such a situation, the trial court is required to submit the case to the jury. Continental Ore Corporation vs. Union Carbide and Carbon Corp., 370 U.S. 690 (1962); Milgram vs. Loew's, supra; Girardi vs. Gates Rubber Co. Sales Division, supra.

The interested witnesses who testified there was no agreement to boycott Manfree were impeached as to that testimony: Witness Hobbs, ((Tr. 159); Mr. Hobbs destroyed his business files during this litigation, (Pr. Tr. 425-428)); witness Sanford, (Pr. Tr. 909-914, Tr. 998-1007, 1009, 1340-1346); witness Paul Thomas (who was shown to have filed false and misleading Answers to Interrogatories (Pl. Ex. No. 4269; Tr. 1444); and who also threw away business records during the pendency of this action, (Tr. 1528)); witness John P. Mitchel,

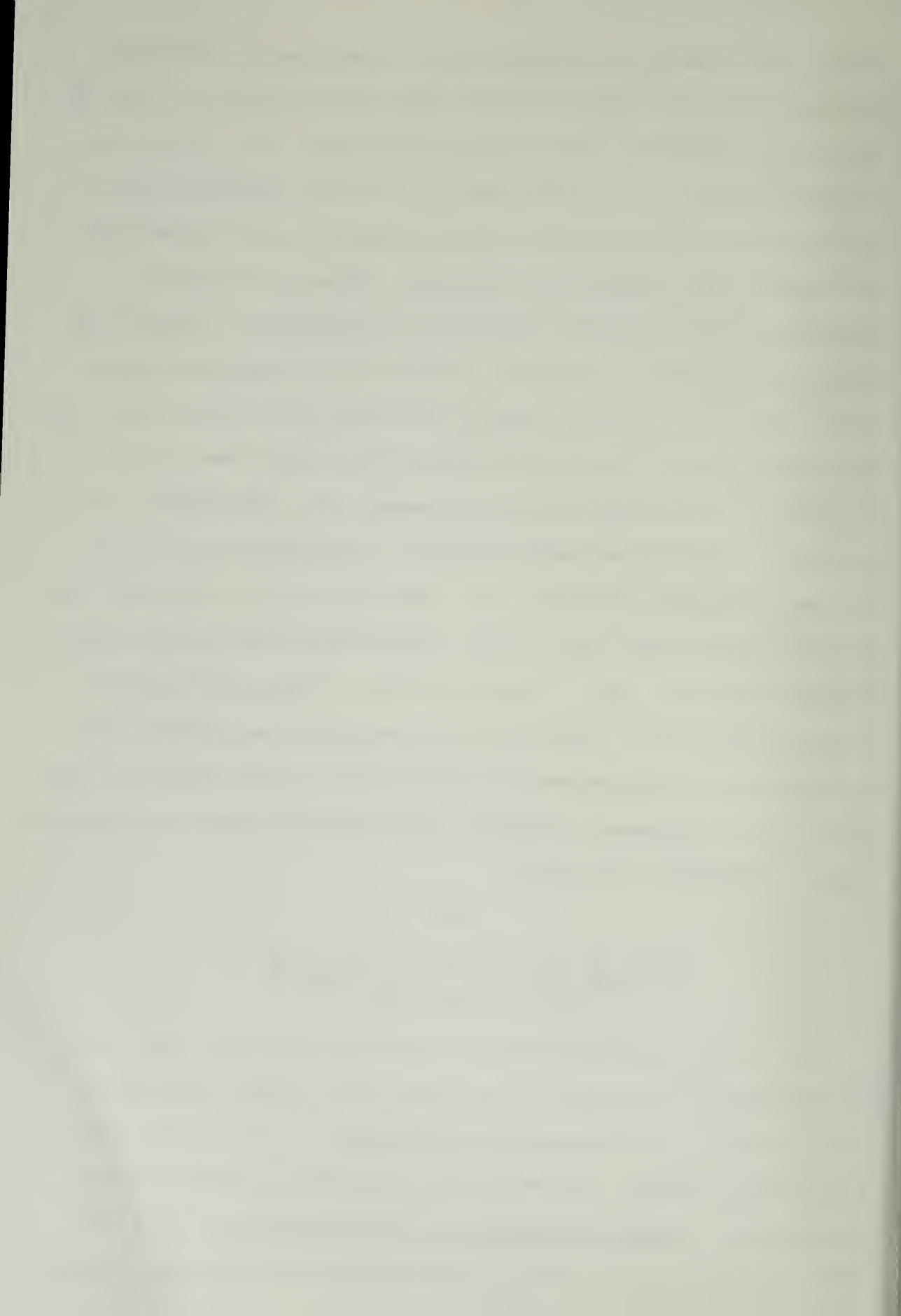


((Tr. 3419-3430); Mr. Mitchel did not mention Mr. Neermann's asserted drinking habits in his deposition); witness Lloyd B. McDonnell, President of California Electric, (Tr. 3632-3634); witness Muntain ((Tr. 3961-3966); the Court ruled this was technically not impeachment, and refused to allow appellants to impeach Mr. Muntain, (Tr. 3941)). Witness Gilbert F. Hamilton, Appliance Sales Manager for Frigidaire, erased his notes made during a telephone conversation concerning appellants (Pl. Ex. No. 491), and his testimony that Frigidaire had no policy against selling to closed-door stores was contradicted by his statement to Mr. Freeman (Tr. 5825-5829). Witness Saxon, Vice President of R.C.A., testified that R.C.A. did not "classify" dealers (Tr. 4606) yet Pl. Ex. Nos. 92, 93 and 94 clearly show that R.C.A. distributed forms which classified retailers (Id.); (see Tr. 4774). Thus, clearly the jury was entitled to believe the appellants' witnesses, and not believe the witnesses who testified, to the contrary, that there was no agreement between appellees and their co-conspirators in restraint of trade.

## VII

EACH OF THE APPELLEES IS LIABLE  
TO APPELLANTS FOR VIOLATIONS OF  
THE SHERMAN ACT.

Under standards applicable to conspiracy law, "any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy . . . not only action, but lack of action, may be enough to infer a combination or conspiracy." Esco Corporation vs. United States, 340 F.2d 1000, 1008 (9th Cir. 1965). All the appellees admitted they



were each in a position to supply Manfree with the products denied it, with the exception of manufacturers R.C.A., Whirlpool, Borg-Warner, and Hotpoint, who asserted immunity because their goods were distributed in the market area by allegedly "independent" distributors.

The defense of these manufacturers ignores the evident purpose of the present conspiracy, to maintain list prices at the retail level, and exclude those who are unwilling to advertise or tag these products at list prices which stem from the manufacturer. (See evidence of extensive manufacturer-distributor contacts at page 24, supra; and record references at pages 28-37, supra). The manufacturers provided the list prices for their goods, which clearly were precisely followed by the distributor, or became the obvious base for the distributor's list prices. (Pl. Ex. Nos. 5114 and 5116). They provided the advertising funds to advertise their products at list prices, under programs requiring adherence to such prices by the retailer in order for it to obtain advertising support funds. (Supra, pages 28-37). Thus, the manufacturers directly and knowingly supported a price-control scheme when they refused to sell to Manfree. They cannot excuse themselves from liability by reference to their distribution agreements, since their own refusals to deal with Manfree were in support of their own policy to support their list prices, and to thereby control list prices in San Francisco. United States vs. Arnold, Schwinn & Co., supra; White Motor Co. vs. United States, 372 U.S. 253, 260 (1963).

Thus the conspiracy had four steps in its implementation





(1) The manufacturer provided the list prices, and funds for list price advertising; (2) the large appliance, furniture and department stores in the market who did most of the advertising of the subject products in the San Francisco newspapers followed list prices, and required the exclusion of Manfree as a seller of such advertised products; (3) the distributors refused to deal with Manfree, as it did not follow list prices in support of the factories' list price maintenance program; and (4) the manufacturers, in order to support and abide by the plan, also refused to sell to Manfree. The record abundantly shows the implementation of each of these steps:

1. Whirlpool established a retail list price method of distribution for its products, and the evidence showed that its San Francisco distributor, Meyer, adhered precisely to those prices 60% of the time during the relevant period. (Pl. Ex. No. 5115). Contrary to the statement in the Trial Court's opinion (R. 24-25), Whirlpool deliberately allocated funds to Meyer for the specific use of Hale, and only for that large retailer. (Pl. Ex. Nos. 685, 689; Tr. 579, 1262-1275). It is claimed that Meyer's advertising-fund policy of restricting such funds only to retailers who advertised at list prices, was unknown to Whirlpool (Tr. 5028); but this is clearly a strained and false inference; Whirlpool knew that San Francisco retail price margins on the subject goods were higher than elsewhere, because of the price demands made by representatives of its key accounts in San Francisco directly to its officers. (Pl. Ex. No. 4227; see pages 118-9, supra).

Whirlpool itself directly refused to deal with



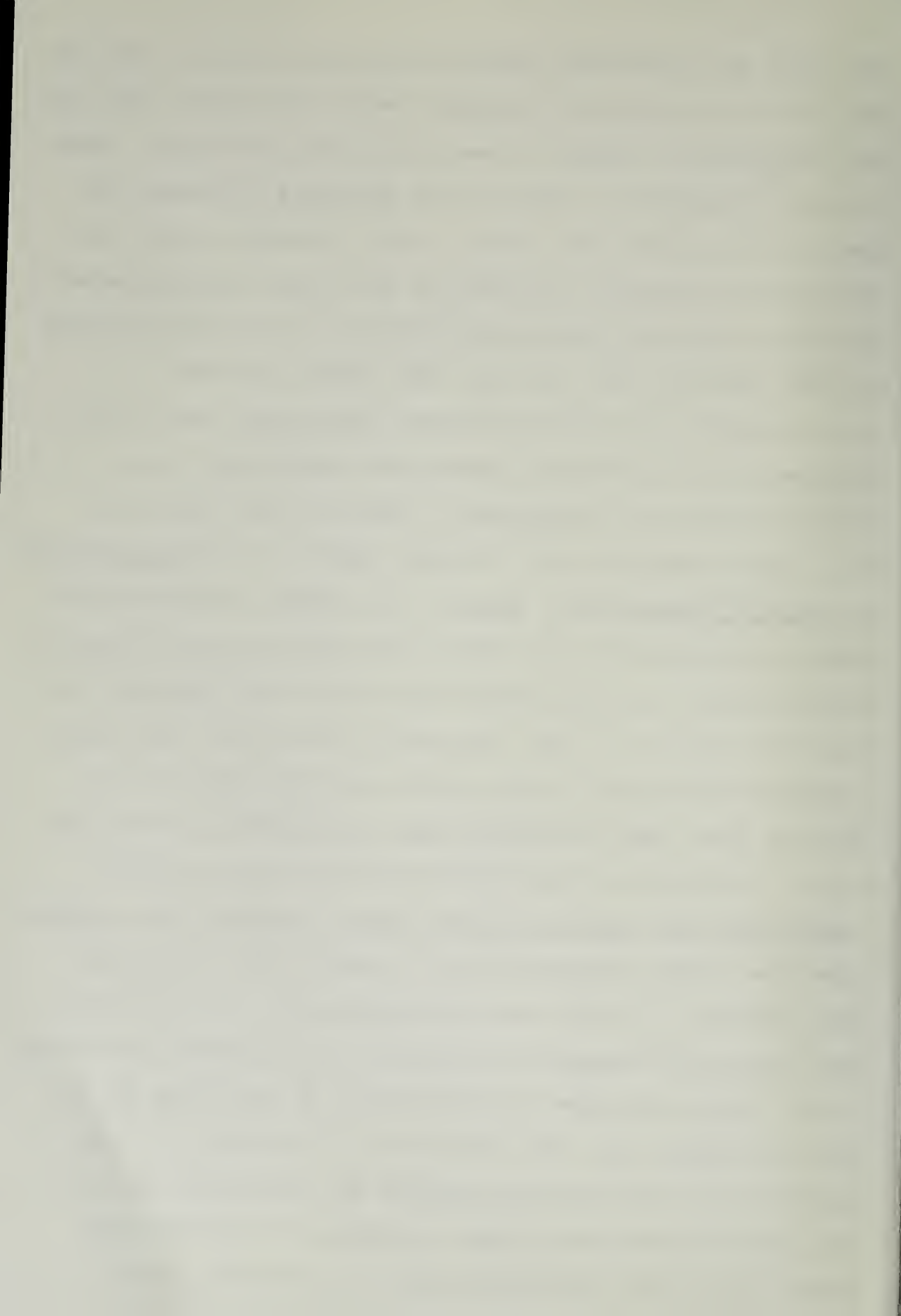
Manfree, saying this was a distributor function (Pl. Ex. Nos. 1718, 1721); although it directly supplied Sears & Roebuck Co., a nationally-known retailer, with its products. (Tr. 5051-5052). Whether this reason was a bona fide one, or part of Whirlpool's participation in a conspiracy, was a question for the jury to decide, in the context of all the other evidence (Continental Ore Corp. vs. Union Carbon & Carbide Corp., 370 U.S. 690, 699 (1962)), and not compartmentalized by itself.

2. R.C.A. was shown to have promulgated a program of distributing its television sets by providing its distributors with retail price sheets. The jury could find that these list prices were followed by its San Francisco distributor, Meyer. (Pl. Ex. Nos. 5114 and 5116). R.C.A. further carried on periodic special dealer advertising programs, and knew that its television sets were being extensively advertised by the retail defendants in San Francisco. (Pl. Ex. Nos. 1842-1846). Further, its sales representatives were in close contact with large R.C.A. retailers in the market area: Regional representative Mr. Dan Gentile periodically visited such stores (Tr. 4749-4751); and its regional sales manager, Mr. Folsom, also periodically visited the large retailers in San Francisco County (Tr. 4732-4736). In 1958, Meyer arranged a meeting between the President and Vice President of R.C.A. and Mr. Hobbs, Hale's Vice President, and Mr. Sanford of Hale to listen to Hale's pricing problems. (Pl. Ex. Nos. 349 and 350). R.C.A. therefore had direct knowledge of Hale's plans to maintain high profit margins. The fact that San Francisco dealers' demands for high margins was known to Whirlpool (Pl. Ex.



No. 4227) was information equally available to R.C.A., who also had field representatives in close contact with Meyer, the common distributor. Indeed, it was R.C.A. who assisted Mr. Hobbs of Hale in obtaining a meeting with Whirlpool's general manager, Mr. Sol Goldin (Tr. 249). R.C.A. refused to sell television sets to Manfree, despite the fact that its distributor's agreement with Meyer expressly allowed it to sell its products in this territory (Pl. Ex. Nos. 1692, 1693, and 1695). It also enforced a reluctantly-accepted distributor territorial arrangement in California, through its subsidiary, R.C.A. Victor Distributing Corporation. (See Tr. 4415, 4489-4490; A. H. Meyer deposition Tr. 10:15-22, 15-17.) Cf. United States vs. Arnold, Schwin & Co., supra. Its regional representatives were in close contact with Meyer (see above) and that company's policy against cut-price advertising could thus logically have been known by R.C.A. (Tr. 1215-1217; 1307-1308). Once again, reasonable inferences to that effect could be made by the trier of fact, when considering all the evidence pointing to R.C.A.'s knowledge of and participation in the conspiracy (Continental Ore Corp. vs. Union Carbon & Carbide Corp., supra.) Meyer was indeed enforcing R.C.A.'s retail list prices with local dealers. (Pl. Ex. Nos. 5114 and 5116). R.C.A.'s business forms were designed to provide it with complete knowledge of the dealer structure in every county in the United States (see Form Number 621, Pl. Ex. Nos. 92, 93 and 94). It was the instigator of the very price margins for television sets which the retailer defendants sought to enforce in San Francisco County, which price structure would be threatened should

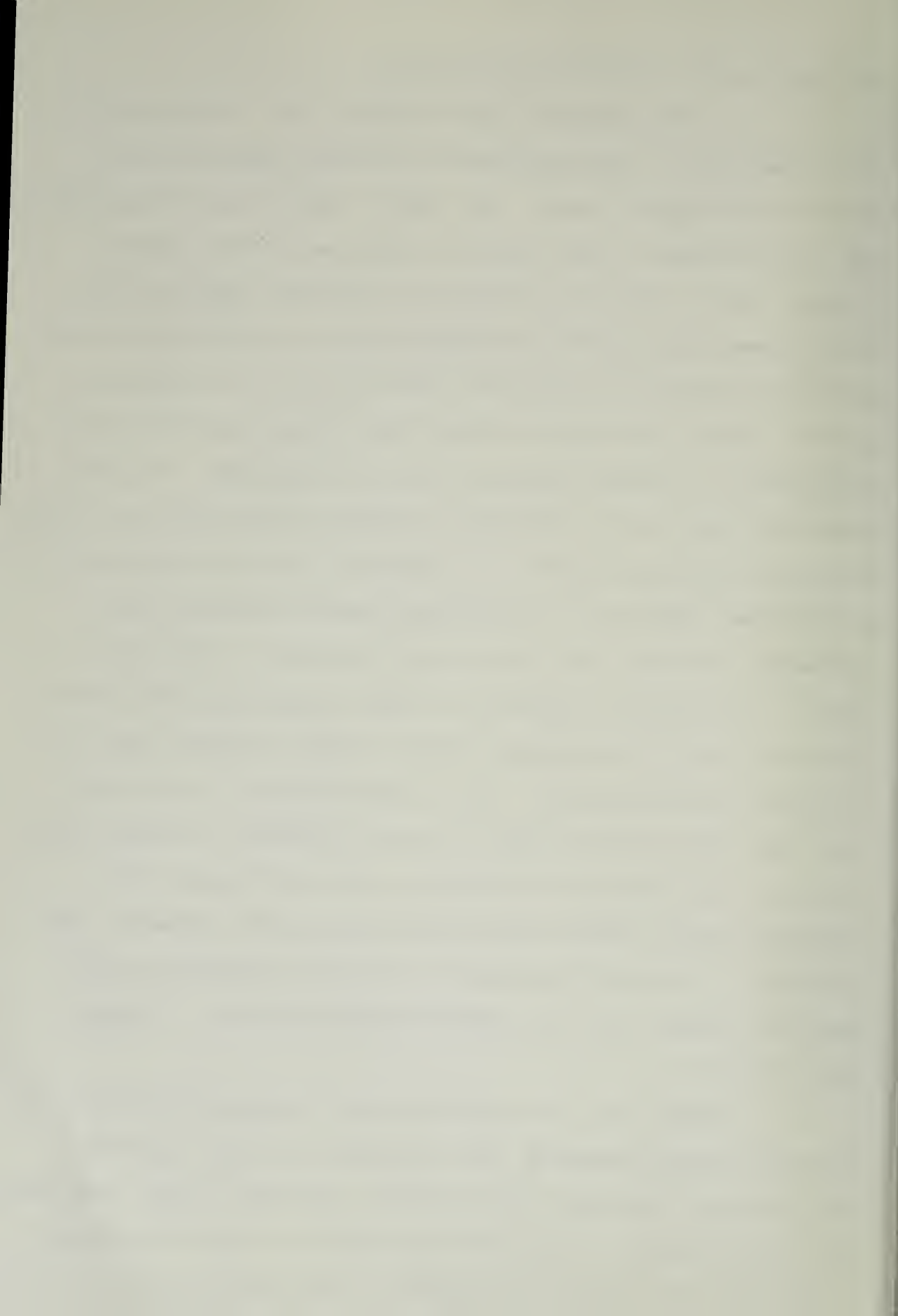




Manfree obtain and sell such products.

3. Borg-Warner's basic defense that it was not directly engaged in the distribution of Norge appliances was found to be without merit. (R. 1962). Thus it and Norge Sales may be considered as one actor for purposes of this appeal. (Ibid.) Such a meritless defense of claiming separate entities between Borg-Warner and Norge Sales was presented because appellees lacked any defense on the merits of the conspiracy action. There was direct evidence that these appellees participated in a boycott against U.S.E. and Manfree: they had knowledge that U.S.E. attempted to obtain Norge appliances from Lancaster, through Graybar. It imposed a fine upon Graybar, Los Angeles, because it transshipped Norge appliances into Lancaster territory (San Francisco) for U.S.E. (Pl. Ex. No. 4023). It refused to permit Mr. Green, appellants' Los Angeles agent, to buy for appellants, after written requests were made to it for Norge products. It is inconceivable, to reasonable men, that Mr. Harold P. Bull, a senior official of Norge Sales, could sit in a meeting in San Mateo with Mr. Freeman, Mr. McDonnell and Mr. Bonnet from their distributor companies and not learn or know of the details of the San Francisco major appliance market, and the boycott against Manfree. (Supra, pages 49-52).

Norge Sales, as did Whirlpool, allocated special advertising funds expressly for the benefit of Hale, setting this retailer up as its "key account" for Norge in San Francisco. (Pl. Ex. No. 4099). The 1960 letter by Mr. Alpine requesting a franchise for Manfree from appellee was sent to Mr. Gil



Freeman, Sales Manager of Lancaster, who met with Mr. Bull at the Villa Hotel in San Mateo. It was Freeman who told Mr. Bonnet to stop transshipping Norge appliances into San Francisco. (Tr. 2592; Pl. Ex. Nos. 553 and 556). Borg-Warner also promulgated price sheets to Norge dealers showing retail list prices, which prices supplied the retailers in San Francisco with the price margins Hale sought to enforce through the boycott. (Pl. Ex. No. 1924). Borg-Warner's factory representative in Northern California, Mr. Gene Schick, was in close contact with Lancaster and discussed dealer relationships. (Tr. 2911-2918, 3010-3015). Mr. Schick investigated the transshipments by Graybar at Mr. Gil Freeman's (Lancaster) request, and admitted he probably talked with Mr. Bull about the matter. (Tr. 2966-2972). Borg-Warner also maintained dealer purchase and advertising forms from which it could obtain complete knowledge of the retail appliance dealer structure in San Francisco. (Pl. Ex. Nos. 4058-4059, 50, 4101).

4. Hotpoint received direct notification that Graybar cancelled Manfree in 1958 (Pl. Ex. Nos. 536A and 536C), and it refused to sell to Manfree, following the latter's 1960 request and thereafter. (Pl. Ex. Nos. 538 and 547). Mr. Wichman, Vice President of G.E. and Manager of its Hotpoint Division, visited San Francisco in 1958 (Tr. 3065-3068), the same year as the Palace Hotel breakfast meeting in which Graybar announced to the San Francisco retailers a change in its sales policy whereby it would no longer sell to discount stores. (Tr. 6120). It was customary for Graybar representatives to discuss franchising of discount stores with Hotpoint

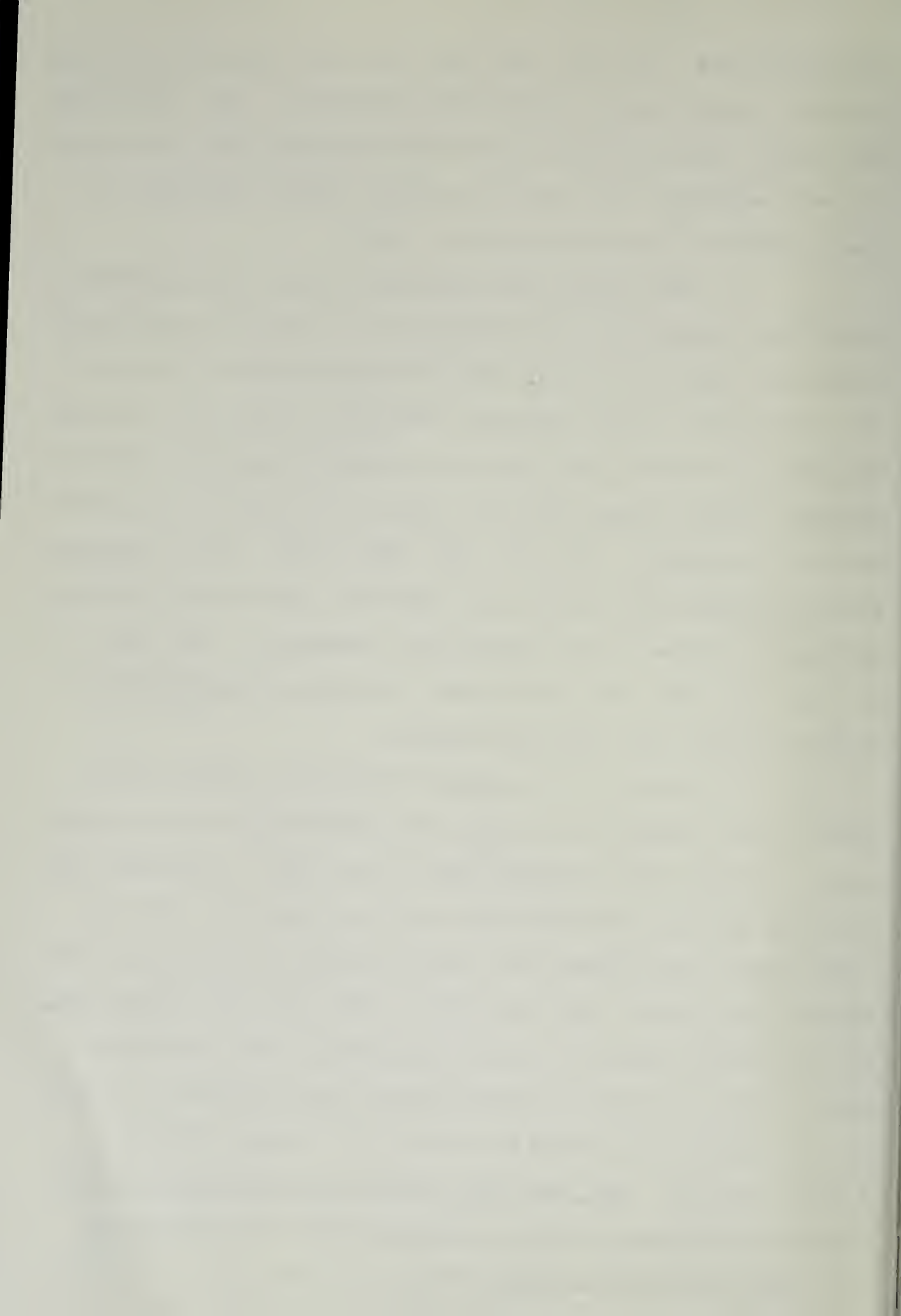


representatives (Pl. Ex. No. 482); and for Hotpoint personnel to visit retail stores with Graybar personnel. (Tr. 3246-3248; 3254-3257). Hotpoint also maintained business forms from which it could ascertain the retail appliance dealer structure in every county in the United States. (Id.)

5. Both Maytag and Frigidaire admittedly completely owned their respective distributing arms, appellee Maytag West Coast (Tr. 3307, 3479-3482), and Frigidaire Sales Corporation (Tr. 4205-4208). Both companies refused to deal with Manfree: Frigidaire Division never made its products available despite requests (supra, pages 49, 56-57, 68), and Maytag also refused Manfree's requests. (Pl. Ex. Nos. 4164, 568). These manufacturers supplied the advertising funds and price lists containing retail prices to the distributor companies, (Tr. 3344, Pl. Ex. Nos. 1920, 338, 1901-1906), and were clearly able to supply Manfree with major appliances.

In summary, it is submitted that the Court below erred in not finding that there was substantial evidence upon which to submit this boycott case to the jury. Conscious and parallel refusals to deal were shown to exist from 1957 to 1964; Manfree was denied the leading brands of television sets during that period, and from March, 1959, it could obtain none of the leading brands of major appliances. The cancellation and/or denial of these leading brands from the period of 1957 to 1959 adequately showed the concert of action directed against Manfree. The fact that these cancellations were not exactly simultaneous does not detract from the parallelism (see Standard Oil Co. of California vs. Moore, 251 F.2d 188,





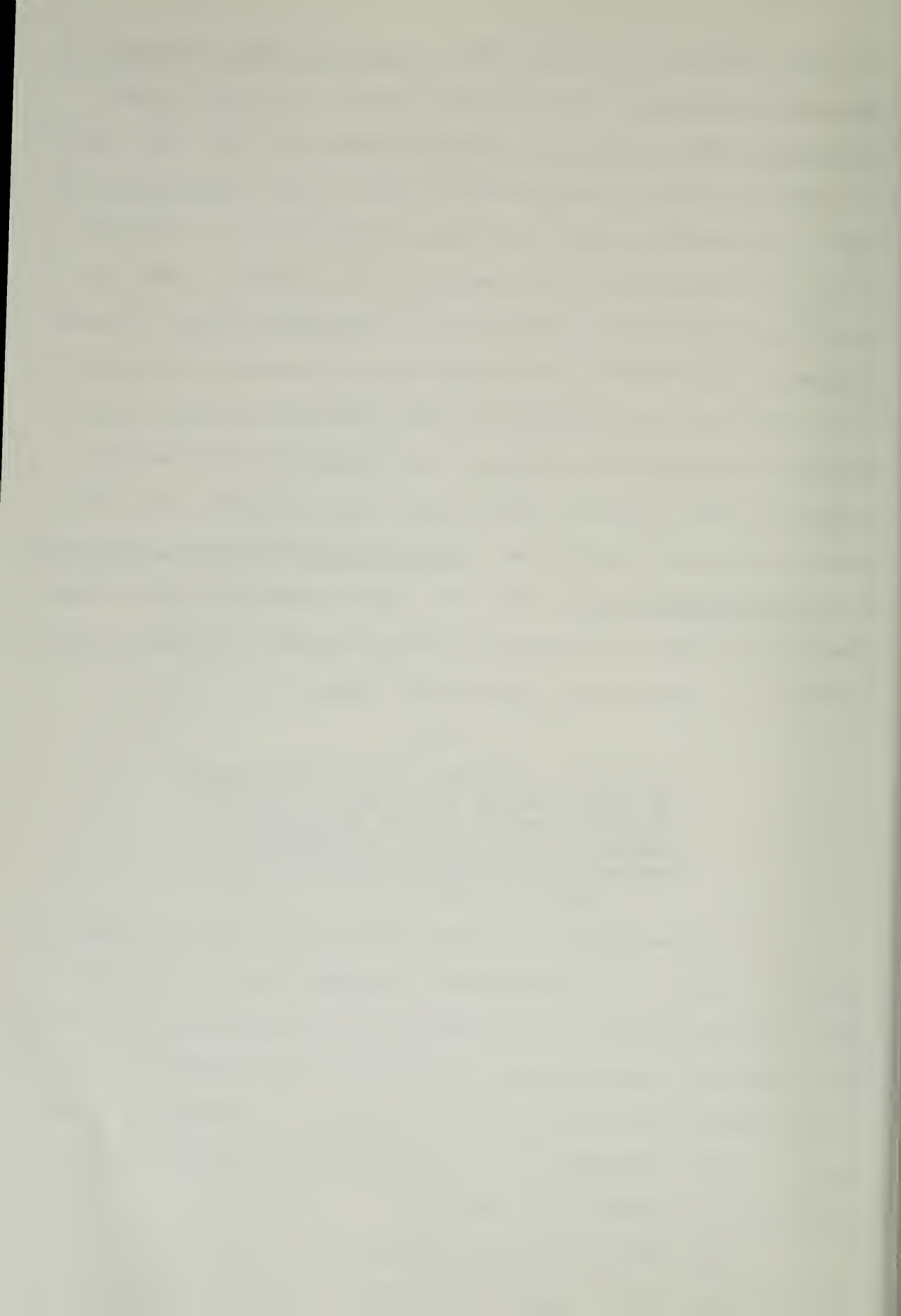
196-204, 205-211 (9th Cir. 1957); Bordonaro Bros. Theatres vs. Paramount Pictures, 176 F.2d 594, 596-597 (2nd Cir. 1949); Interstate Circuit Inc. vs. United States, 306 U.S. 208 (1939)); it equally shows the reluctance of some of the vendors to cancel a successful account with future potential, or the decision of a conspirator to accomplish its refusal to deal by allowing a franchise to expire at a subsequent date. In each instance, the vendor's cancellation was followed by an absolute and continuing refusal to deal. The fact that various parties interpose the defense of the right to unilaterally refuse to deal, does not take away a case from the jury, but simply makes it a jury case. Theatre Enterprises vs. Paramount Film Distributing Corp., 346 U.S. 537 at pages 541-542 (1954). Clearly the Court committed prejudicial error in these circumstances, in non-suiting appellants' case.

#### VIII

THE COURT COMMITTED PREJUDICIAL ERROR  
IN NOT ALLOWING APPELLANTS TO OBTAIN  
JUDGMENTS BASED ON THE EXISTENCE OF  
VERTICAL CONSPIRACIES TO RESTRAIN AND  
MONOPOLIZE INTERSTATE TRADE AND COMMERCE.  
(Specification of Errors III)

At the Court's direction appellants made an offer of proof in support of instructions to permit the jury to determine liability based on appellees' and co-conspirators' entry into vertical conspiracies, in violation of Sections 1 and 2 of the Sherman Act; (and based an attempt to monopolize such trade, in the violation of Section 2 of the Sherman Act, by co-conspirator Hale). (R. 1481).

The Court in its Pre-Trial Order dated August 13, 1960 (R. 1608-1609), limited the issues to be tried solely to



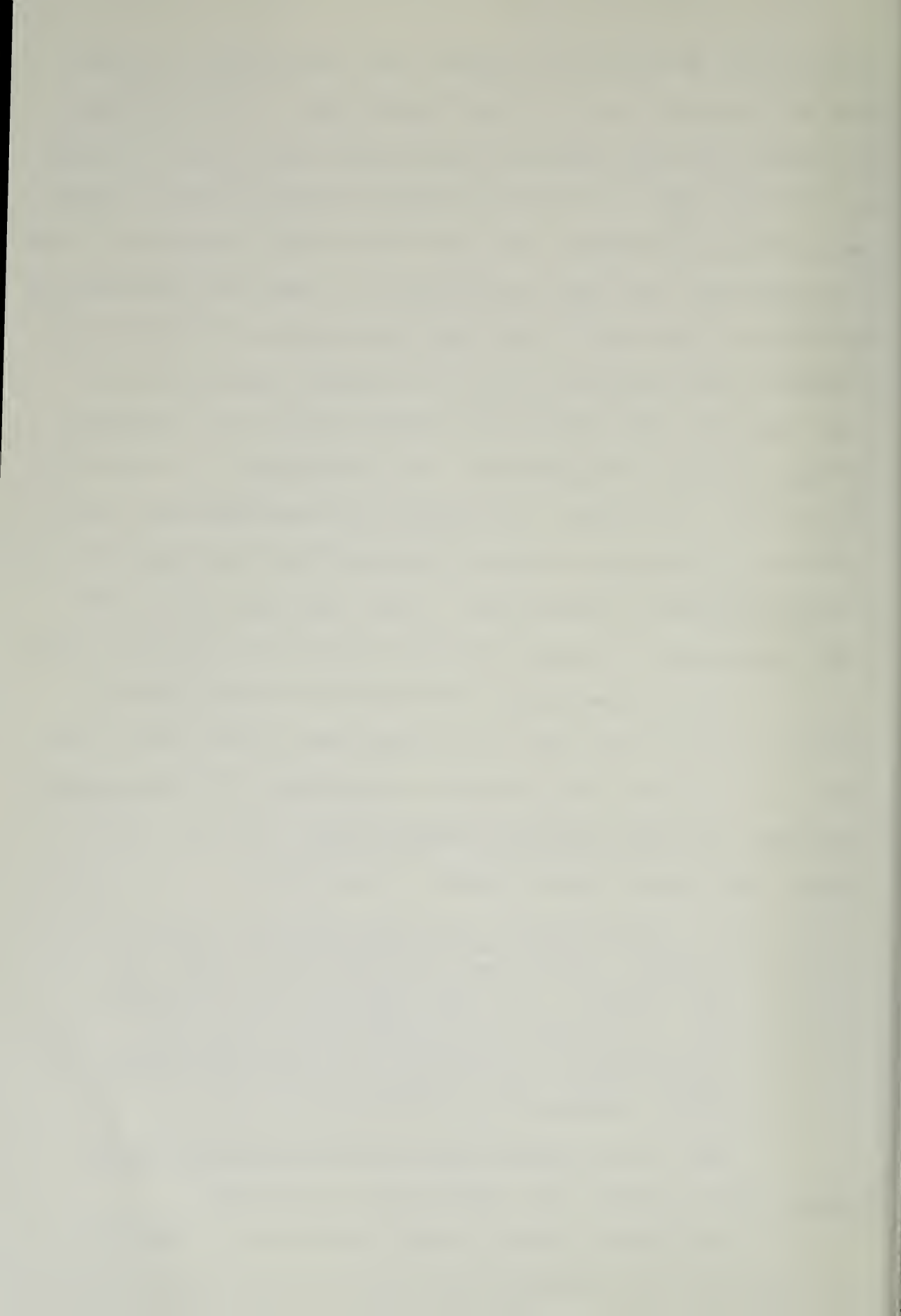
a horizontal conspiracy to boycott the plaintiffs, in violation of Sections 1 and 2 of the Sherman Act. In so limiting the case, the Court prevented appellants from proving or seeking recovery upon a vertical conspiracy between Hale or other retail dealer defendants, and each individual distributor named as a defendant, and each manufacturer so named who manufactured the product line sold by each such distributor; to (i) fix and maintain retail prices, and (ii) to boycott appellants pursuant thereto. The complaints clearly charged the existence of these vertical conspiracies. See Paragraphs 7a, 7b and 10. (R. 1, 8-11; 15, 20-24). In Answers to Interrogatories from defendants, appellants clearly informed them that they were alleging vertical conspiracies. (See, for instance, R. 964-965). Appellants' Pretrial Statement made it an issue (R. 1694).

It is respectfully urged that the Court erred in limiting the theories upon which appellants could obtain judgment, in the face of the charging allegations. In Continental Ore Corp. vs. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), the Supreme Court stated, at page 790:

"Petitioner's complaint did not preclude reliance on unilateral monopolization and the evidence offered was relevant and material to such charge. The trial court's misinterpretation of the law in the defining 'monopolization' and 'attempted monopolization' in terms of 'conspiracy to monopolize' was therefore prejudicial rather than harmless. This error should not be repeated in a new trial."

See, also, Philco Corp. v. Radio Corporation of America, 186 F. Supp. 155, 159-160 (E.D. Pa. 1960).

The record spells out the substantial evidence by which the jury could conclude that the lines manufactured and



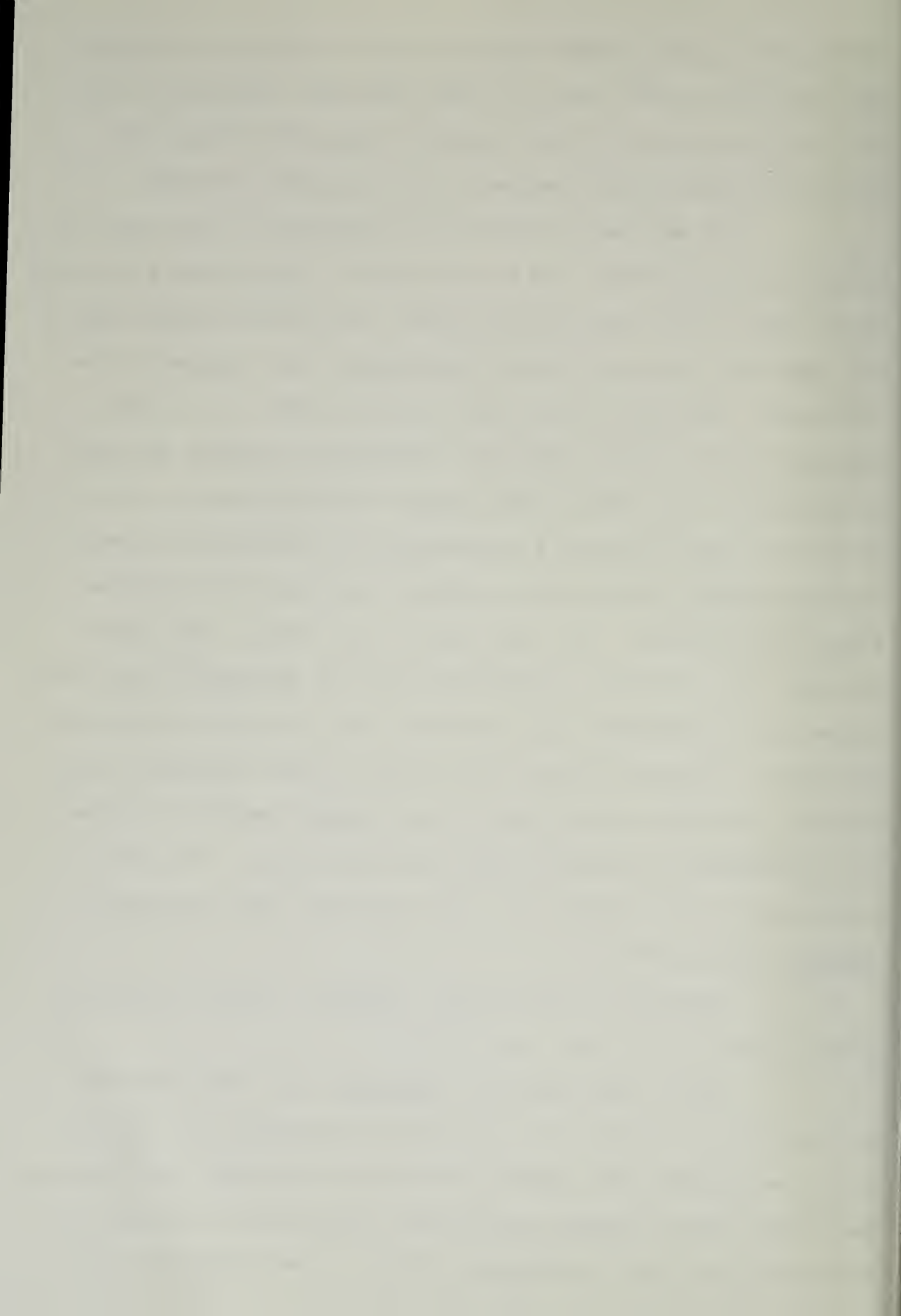
distributed by the vendor appellees were sold to the defendant retailers on the basis of such retailers agreeing to follow the list prices of the vendors in the advertising and tagging of their retail prices on the products involved.

All of these companies did business on the basis of suggested list prices. This is admitted, except that Frigidaire claims that it did not utilize retail list prices after 1961, and Hotpoint claims it did not promulgate list prices to distributors. (But see Pl. Ex. for Id. No. 5050). R.C.A. and Whirlpool were clearly shown by substantial evidence to have promulgated their retail list prices to distributors, and to have been aware of Meyer's utilization of cooperative advertising policies under which a dealer was required to follow retail list prices. (Pl. Ex. for Id. No. 1161). The Meyer salesman, Mr. Erickson, testified that his dealers by and large tagged this merchandise at suggested list price (Tr. 4853-4857). Whirlpool, as stated before, was shown to have knowledge that the San Francisco market was a "high margin" market, because of the demands of certain large retailers there. Hale was identified in the record as a "key account" with Whirlpool. (Supra, pages 39-40).

Hotpoint's distributor, Graybar, clearly utilized list prices (Pl. Ex. Nos. 339, 340).

Thus, even assuming, arguendo, that the evidence did not warrant a finding of a horizontal conspiracy, it is clear from the evidence that appellees were participants to a vertical price fixing program whereby the distributors and manufacturers did not sell to discount stores in San Francisco, and





specifically to appellants, pursuant to an attempt to fix advertised and tag prices in the San Francisco retail market as to major appliances and television sets. Continental Ore Corp. vs. Union Carbide & Carbon Corp., supra, at page 790. Such vertical conspiracies are illegal per se. In United States vs. Arnold, Schwinn & Co., 87 S.Ct. 1856 (1967), the Supreme Court held that the promulgation of a vertical plan to prevent distributors or retailers from selling to discount stores or mass merchandisers constituted a per se violation of the Sherman Act when title to the goods was shown to have passed to these distributors or retailers. This is so whether or not the restrictions are by explicit agreement or by silent combination. (Id. at pages 1864 and 1867).

Here the record shows such a silent combination. The products of appellees were subject to specified list prices, and only those dealers in San Francisco who advertised or tagged at list price were able to sell the products. It is respectfully submitted that the proper enforcement of the antitrust laws does not allow vertical combinations to escape liability where these combinations are alleged to exist, simply because the conspirators are also participants to a horizontal conspiracy.

## IX

THE COURT ERRED IN ORDERING A SEPARATE  
VERDICT ON THE ISSUE OF LIABILITY BEFORE  
ALLOWING THE JURY TO CONSIDER THE AMOUNT  
OF DAMAGES SUFFERED BY APPELLANTS.

(Specification of Errors II)

A businessman whose enterprise is endangered or damaged by the acts of others in violation of the Sherman Act, and who therefore seeks protection under Section 4 of the Clayton



Act, is entitled to his full day in Court. This day in Court consists basically of showing the injury to plaintiff's business and the damages incurred by reason of the conspiracy in restraint of trade.

It is respectfully urged that the trial court erred in treating this private antitrust case differently from any other action for damages. The central issues in any liability case are how much the complainant has been injured by reason of the defendant's wrongful conduct. If enforcement of the antitrust laws is to rely upon private litigation as Congressional policy seeks (Olympic Refining Company vs. Carter, 332 F.2d 260, 26 (9th Cir.1964)) the private litigant should not be subjected to bifurcated trials as an addition to the series of hurdles the plaintiff must overcome. Burdens are not to be added to private antitrust actions, beyond what is specifically set forth by Congress in the antitrust laws. Radovich vs. National Football League, 332 U.S. 445, 454 (1957).

Further, damages cannot logically nor fairly be separated from the trial of the existence of a violation: "One cannot think of private liability for violation of the antitrust laws except in terms of impact and damage." Haverhill Gazette Co. vs. Union Leader Corp., 333 F.2d 798, 802 (1st Cir. 1964), cert. den., 379 U.S. 391 (1965). Showings of damage are relevant to the proof of violation: the decrease in sales by the complainant, and its showing of a profitable business turned into a losing business by the impact of a boycott, though evidence of a financial nature, tends to show there is a conspiracy in operation, rather than supposed ineptitude of the plaintiff's



business. It is respectfully urged here as in United Air Lines vs. Weiner, 286 F. 2d 302, 306 (9th Cir. 1961), that the "question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which could amount to a denial of a fair trial."

X

THE COURT COMMITTED PREJUDICIAL ERROR  
IN DISMISSING APPELLEE NORGE SALES  
FROM ACTION NO. 42674 ON ITS MOTION  
IN SUMMARY JUDGMENT.

(Specification of Errors IV)

The Court dismissed appellee Norge Sales from Action No. 42674 on the basis that it had not been joined as a party within four years from the alleged beginning of the conspiracy. Norge Sales was made a defendant in the second complaint on August 4, 1964. The Court ruled that the Clayton Act statute of limitations, 15 U.S.C.A. § 15(b)<sup>8/</sup> required appellants to sue Norge Sales within four years from the time the conspiracy commenced to their injury. See Garelick vs. Goerlich's Inc., 323 F.2d 584 (6th Cir. 1963). But the situation in this case is that appellants did commence an action alleging the existence of the conspiracy within four years of the time it commenced to injure them, and merely added an additional conspirator (Norge Sales) who allegedly injured them through acts done within four years prior to the filing of the second complaint.

The question of the liability of Norge Sales to

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<sup>8/</sup> Section 4b of the Clayton Act (15 U.S.C.A. § 15(b)) is set forth in Appendix D.





appellants was raised by Borg-Warner in its Answer filed November 8, 1960. (R. 80, 81-82). Borg-Warner itself claimed that Norge Sales, its wholly-owned subsidiary, should have been named as a defendant. (R. 197-200, 222-224). Appellants were entitled to sue any parties they believed to have been parties to the boycott conspiracy, and these parties are liable to appellants for any acts done pursuant to the conspiracy which caused them injury any time within four years prior to the time such defendants were made parties to the action. Flinkote Company vs. Lysfjord, 246 F.2d 368, 394-396 (9th Cir. 1957).

The injured party may always name as defendants the members of the conspiracy who are liable to it. Marino vs. United States, 91 F.2d 691 at 696 (9th Cir. 1937). The joinder of a party to a conspiracy suit does not create a new conspiracy, and does not change the status of the other conspirators. The new member is as guilty as if he were an original conspirator. United States vs. Borden Co., 308 U.S. 188, 202 (1939); United States vs. New York Great Atlantic and Pacific Tea Co., 137 F. 2d 459, 463 (5th Cir. 1943), cert. den., 320 U.S. 783 (1943). The most Norge Sales could seek in this situation would be a special instruction limiting its liability to acts occurring four years prior to August 4, 1964. But, it is respectfully urged, it clearly was not entitled to a dismissal based upon the statute of limitations provision of the Clayton Act.



EVEN ASSUMING THAT THE TRIAL COURT DID NOT ERR IN NON-SUITING APPELLANTS UPON THE EVIDENCE ADMITTED, IT COMMITTED PREJUDICIAL ERROR IN THE EXCLUSION OF ADMISSIBLE, RELEVANT AND MATERIAL EVIDENCE OF A SUBSTANTIAL NATURE OFFERED BY APPELLANTS IN SUPPORT OF THEIR CASE.

A. The Trial Court Committed Prejudicial Error In Excluding Evidence Proving The Participation Of California Electric In The Conspiracy To Boycott Appellants:  
(Specification of Errors V,A,1.)

1. Mr. Joseph Valenson, the Sales Manager of appellee California Electric during the period when the boycott conspiracy was instituted and maintained (Tr. 3689-3700), admitted that his company because of its activities was liable to the appellants; but the Court erroneously excluded evidence of this admission. It is well-established that the admissions of liability of a general manager of a party defendant are admissible against it in a conspiracy trial. Moran vs. Pittsburgh-Des Moines Steel Co., 183 F.2d 467, 472 (3rd Cir. 1950); Continental Baking Company vs. United States, 281 F.2d 137, 149-150 (6th Cir. 1960); Flinkote Company vs. Lysfjord, 246 F.2d 368, 385-386 (9th Cir. 1957). Mr. Rising, the General Manager of California Electric (Tr. 6664), testified that responsibility for supervising the company's salesmen in the San Francisco territory was delegated to Valenson (Tr. 3692). He also testified that Mr. Valenson would conduct the meetings for sales personnel (Tr. 3739-3740); that the decisions as to the availability of advertising funds for dealers came under Valenson's jurisdiction (Tr. 3751); and that it was customary in the business affairs of the company for Valenson to approve advertising



proposals with retail dealers (Tr. 3753-3754). Pl. Ex. Nos. 665, and 1847-1898 identified Valenson as signator for appellee to documents approving advertising arrangements with Hale. The substance of the vital admissions made by Mr. Valenson to Mr. Freeman (and record references) have been set out in Specification of Errors, V,A,1. These were manifestly admissions against a party defendant made by its managing agent. It was reversible error to reject such admissions. Continental Ore Co. vs. Union Carbide & Carbon Corp., 370 U.S. 690, 702-703 (1961); Moran vs. Pittsburgh-Des Moines Steel Company, supra; Flintkote Company vs. Lysfjord, supra; Johnson vs. Bimini Hot Springs, 56 C.A.2d 892, 902 (1943); Shields vs. Oxnard Harbor District, 46 C.A. 2d 477, 488 (1941).

The admissions of Mr. Valenson to Mr. Freeman not only were admissible against California Electric, but were also admissible against the other co-conspirators, under the well-known rule that after prima facie proof of a conspiracy, the act or declaration of a conspirator against his co-conspirators relating to the conspiracy, may be proved as an admission. Schine Chain Theatres vs. United States, 334 U.S. 110, 116-117 (1948).

The Court rejected appellants' offers of proof of the admissions of Mr. Valenson on the grounds that the statements were not shown to have been made in "furtherance" of the conspiracy, and were unduly "prejudicial." (Tr. 5863). But a statement made by a co-conspirator concerning acts which themselves reflect the execution of the conspiracy is admissible, although the actual making of the statement in no way "furtheres" the conspiracy. It is sufficient for the purposes of admissibility





that the subject matter of the co-conspirator's admission relates to the purpose of the conspiracy or as being explanatory of acts done in furtherance of the objects of the conspiracy.

See United States vs. E. I. DuPont de Nemours Co., 107 F. Supp.

324 (D.Del. 1952), at page 325, where Judge Leahy stated:

"1. A declaration of a co-conspirator is admissible even though made only to other members of the co-conspirator's organization or to other third parties (citing cases). duPont contends, however, the criterion of admissibility of the declaration is 'the making' and the statement can only come in if 'the making' is itself in 'furtherance of the conspiracy'. I think it sufficient for purposes of admissibility if the subject matter of the co-conspirator's admission relates to the purpose of the conspiracy or is explanatory of acts done in furtherance of the objects of the conspiracy (citing cases). Thus, a statement by a co-conspirator to a third party concerning some act done in furtherance of the conspiracy is admissible although the actual making of the statement in no way furthered the conspiracy..." (Emphasis added.)

Clearly the statements to Mr. Freeman by Mr. Valenson that he was expected by his company to give false testimony about this case, and that Mr. Muntain, California Electric sales representative, had given false testimony, were statements explaining acts in furtherance of a conspiracy, including the suppression of evidence pursuant thereto. It is clear that there was sufficient basis to allow the admissions of Mr. Valenson into evidence under the co-conspirator rule.

Among Valenson's statements to Mr. Freeman was an admission that "plaintiffs had a \$1,000,000.00 lawsuit". This statement should have also been admitted as impeachment of witnesses such as Mr. Rising, another managing agent of California Electric (Tr. 3664), who denied that any retailer, distributor



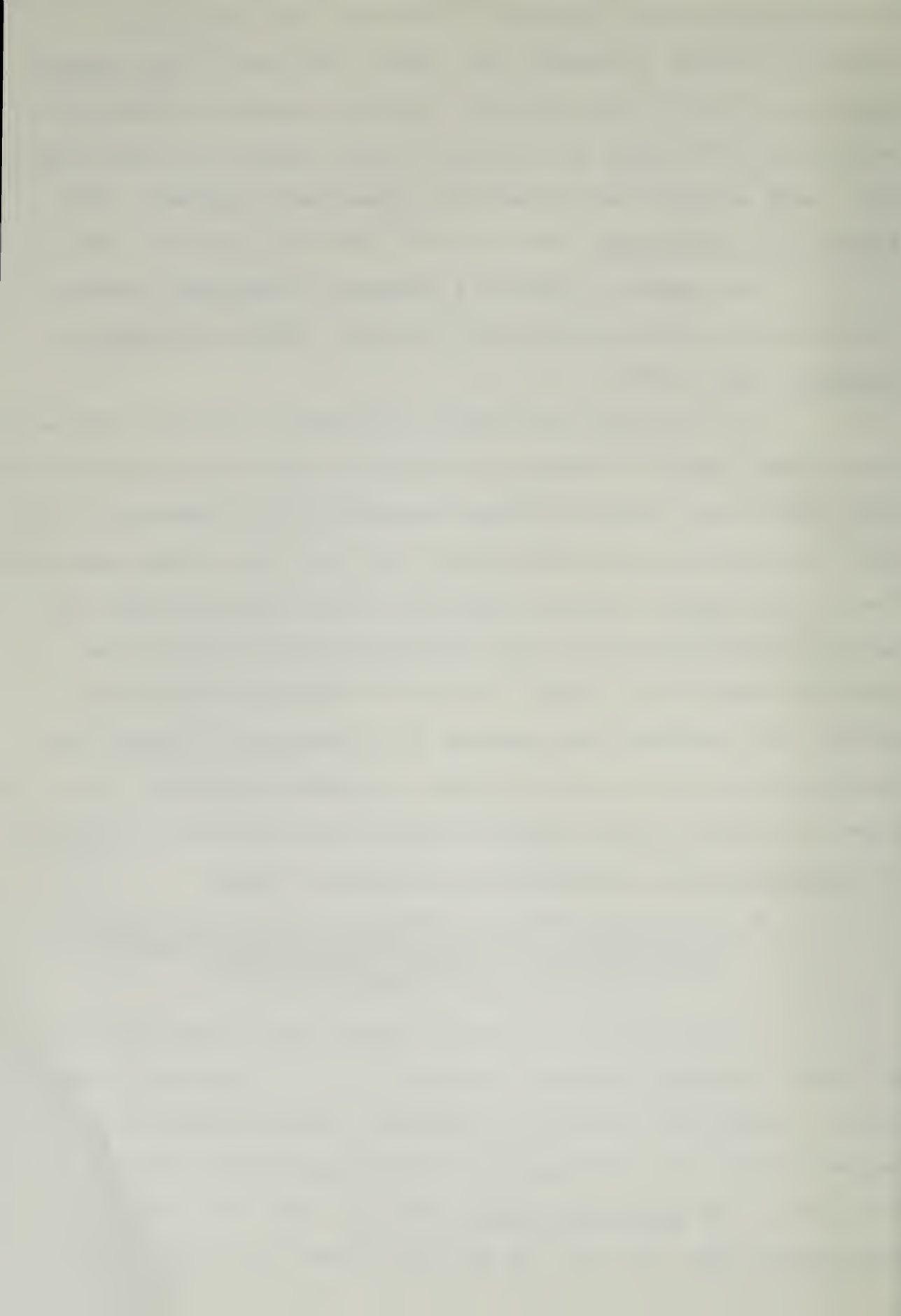
or manufacturer ever suggested or directed that California Electric not sell to Manfree (Tr. 3865). The plea of nolo contendere in antitrust cases provides a similar example: although not admissible as evidence of liability (under Section 5 of the Clayton Act), such evidence may be used for impeachment purposes. (See Pfotzer vs. Aqua System, 162 F.2d 779, 784-785 (2nd Cir. 1947).)

An attempt to corrupt a witness, or suppress evidence, constitutes as admission against the party. Witkin, California Evidence, §513 (1966).

2. The Court erroneously excluded Mr. Rising's admission that it was "general industry practice" to only allow retailers to have advertising credits if they advertised at the factory's list price (see Specification of Errors V, A, 2.) This witness testified that it was general industry practice for the manufacturers of major household appliances and television sets to utilize co-operative advertising funds, in order to maintain retail list prices. This evidence was excluded (Tr. 3813-3814). Clearly such testimony was relevant to the issue of concert of action, and is the type of evidence deemed properly admitted by this Court's decision in Standard Oil Co. of California vs. Moore, supra.

B. The Court Committed Prejudicial Error In Excluding Evidence That Borg-Warner Participated In The Conspiracy To Boycott Appellants:  
(Specification of Errors V, B.)

1. The Court erroneously struck Borg-Warner Exhibit No. 9024 (see Specification of Errors V, B, 1.) Appellee voluntarily offered this exhibit in evidence, thereby constituting a stipulation by its attorney as to its admissibility, binding on that party. See Wilson vs. Mattei, 84 C.A. 562, 572 (1927); and Buchanan vs. Nye, 128 C.A. 2d 582, 585 (1954). By striking this





evidence upon a later change of mind by appellee, the District Court ignored evidentiary law and took sides with the appellees. It was favoritism for the Court to permit Borg-Warner to withdraw this exhibit; then deny appellants the right to fully examine witness Mr. Vern Brown, on the ground that the full scope of Mr. Brown's prospective testimony was not set forth in appellants' pre-trial listing of witnesses and their testimony. See infra, and Specification of Errors V, C, 4.) Clearly, one wishing to object to the admissibility of evidence waives the right to do so by failing to make a timely objection. McCormick, Evidence, § 52 (1954). Here, at the time the exhibit was introduced, appellee not only made no objection, it actively sponsored the introduction. And, where one party so elicits the evidence himself, or volunteers its introduction into evidence, he waives all objections to its use, and cannot thereafter move to have such evidence stricken. Estate of Schulmeyer, 171 Cal. 340, 345 (1915); People ex rel. Dept. of Public Works vs. Glen Arms Estate, Inc., 230 C.A.2d 841, 850 (1964).

2. The Court also erred in excluding appellants' Exhibits Nos. 431, 3006, 3007, 3022, 3024, 3026, 3029, 3030, 3032, 3036 and 3037, proving the establishment of a fixed and rigid market system by the manufacturers of major household appliances, and clearly evidencing the motive of these major companies to aid and assist in the control by retailers of entry into the San Francisco market (as a "list price" market). (See Specification of Errors, V, B, 2 and 3.)

Borg-Warner, G.E., Frigidaire, Whirlpool, and Hotpoint were shown, by this evidence, to be working together at management





level to establish a fixed distribution system throughout the country, clearly contemplating the enforcement of their retail price policies on distributors (see Pl. Ex. for Id. No. 431, as Appendix B hereto). Appellants began their case by proving an agreement by the defendants to establish published "list prices" as the advertised retail prices in the market. Borg-Warner and the other major appliance manufacturers were working on this goal (R. Ex. for Id. No. 431, supra). This evidence shows that the management representatives of manufacturers of major electrical appliances and home laundry equipment met together and discussed the enforcement of a single price system, and a fixed and rigid distribution market throughout the United States. This was after the well-publicized indictment of leading electrical system producers in Philadelphia for price-fixing. Such exhibits graphically demonstrate that these manufacturers had the purpose, and motive, to enforce retail list prices as a group: to assist a local conspiracy to boycott retailers (like Manfree) who didn't follow list prices and thereby threatened to destroy the very functioning of the list price program as an effective market control tool; and that they were working together as an industry in establishing joint policies controlling retailer advertising and prices. It was error to exclude this evidence. Standard Oil Co. of California vs. Moore, supra; Continental Ore Corp. vs. Union Carbide & Carbon Corp., supra.

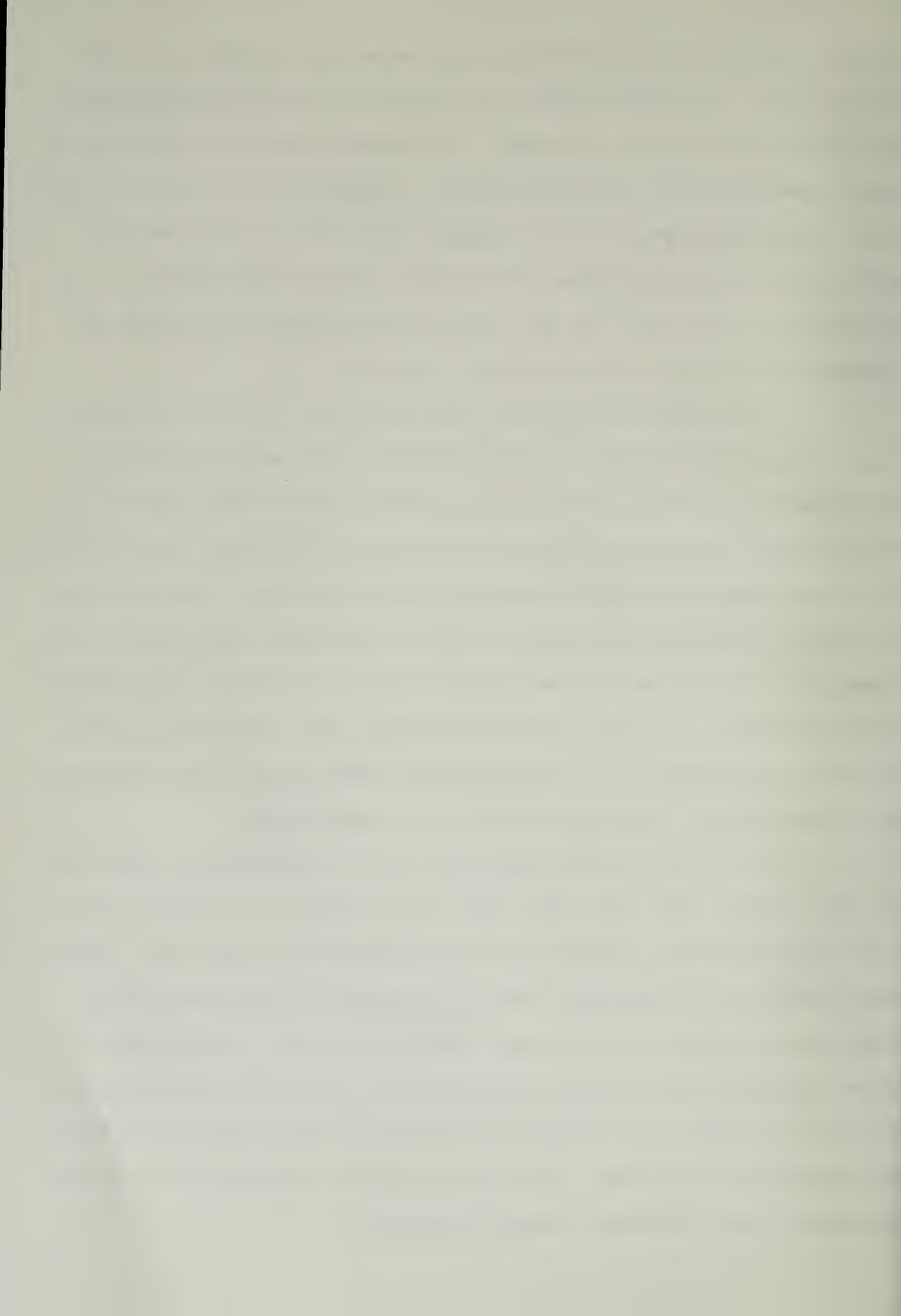
3. The Court erred in excluding evidence of the intent of Borg-Warner to boycott appellants (see Specification of Errors, V, B, 5 and 6.) Borg-Warner attempted to explain the significance of the meeting between Mr. Bull and representatives



of its affiliated distributors, Lancaster and Graybar, at the Villa Hotel, described before, as merely a meeting to determine who would pay "service charges" on transshipped Norge appliances under Borg-Warner's warranty policy. Appellants, however, urged that the meeting was held to discuss what to do about Manfree obtaining Norge appliances through Mr. Green and Graybar in Los Angeles. Pl. Ex. for Id. No. 4028 clearly shows that this was indeed the primary purpose of the meeting.

The testimony of Mr. Green that Mr. Bonnet of Graybar (who attended the meeting) threatened to stop selling Norge appliances to Mr. Green for his own store, showed the extent to which these conspirators would go to prevent Manfree from obtaining Norge appliances and to maintain the boycott. This conduct is clearly unwarranted pressure upon a retailer, and permits the reasonable inference of the existence of an unlawful undertaking and enterprise. It was error to exclude such testimony, since it was a statement of a co-conspirator made during the existence of a conspiracy, and aimed directly at appellants.

4. It was error for the Court to exclude Pl. Ex. for Id. Nos. 1922, 1923 and 3095 (see Specification of Errors, V, B, 4.) These exhibits established that Borg-Warner had full notice that distributor Lancaster was following its Norge Division's list price schedule in the San Francisco market. Such evidence thus disproved the defense of Borg-Warner (R. 1950, 1962) that it did not direct its Northern California distributor in matters of pricing by retailers, and advertising by retailers under advertising fund programs run by Lancaster.



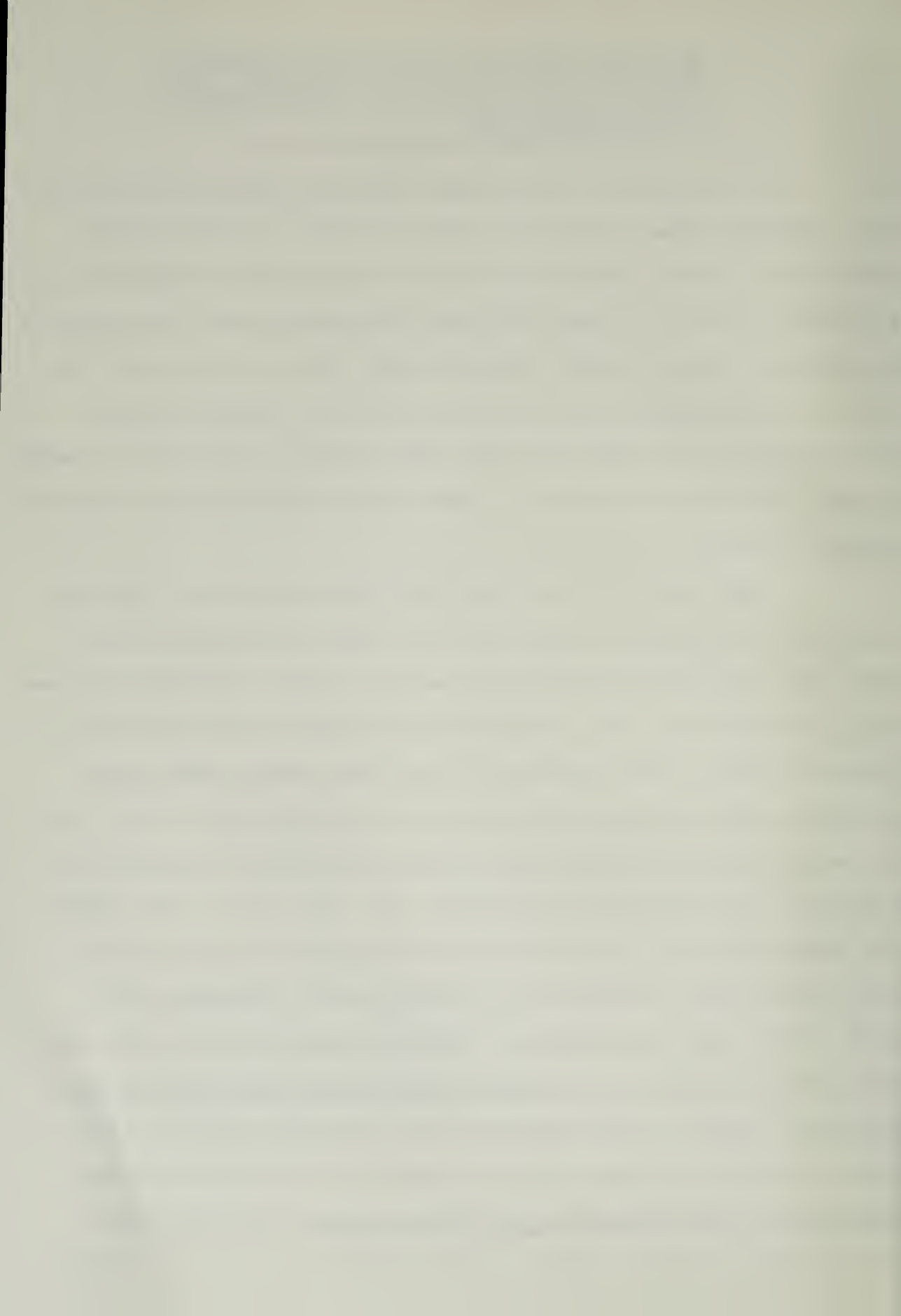
C. The Court Committed Prejudicial Error In Excluding Evidence Proving That G.E. And Hotpoint Participated In A Conspiracy To Boycott Appellants:

(Specification of Errors, V, C.)

1. The Court erroneously excluded direct evidence that G.E. admitted that its dealers did not engage in retail price competition in San Francisco; that it maintained schedules of the particular brands of appliances and television sets being carried by discount stores in San Francisco, San Jose, and Oakland; and that it only agreed to sell its products to a large discount store chain in the East Bay area (White Front), after Hale ceased to sell the subject products. (See record references at Specification of Errors, V, C, 1.)

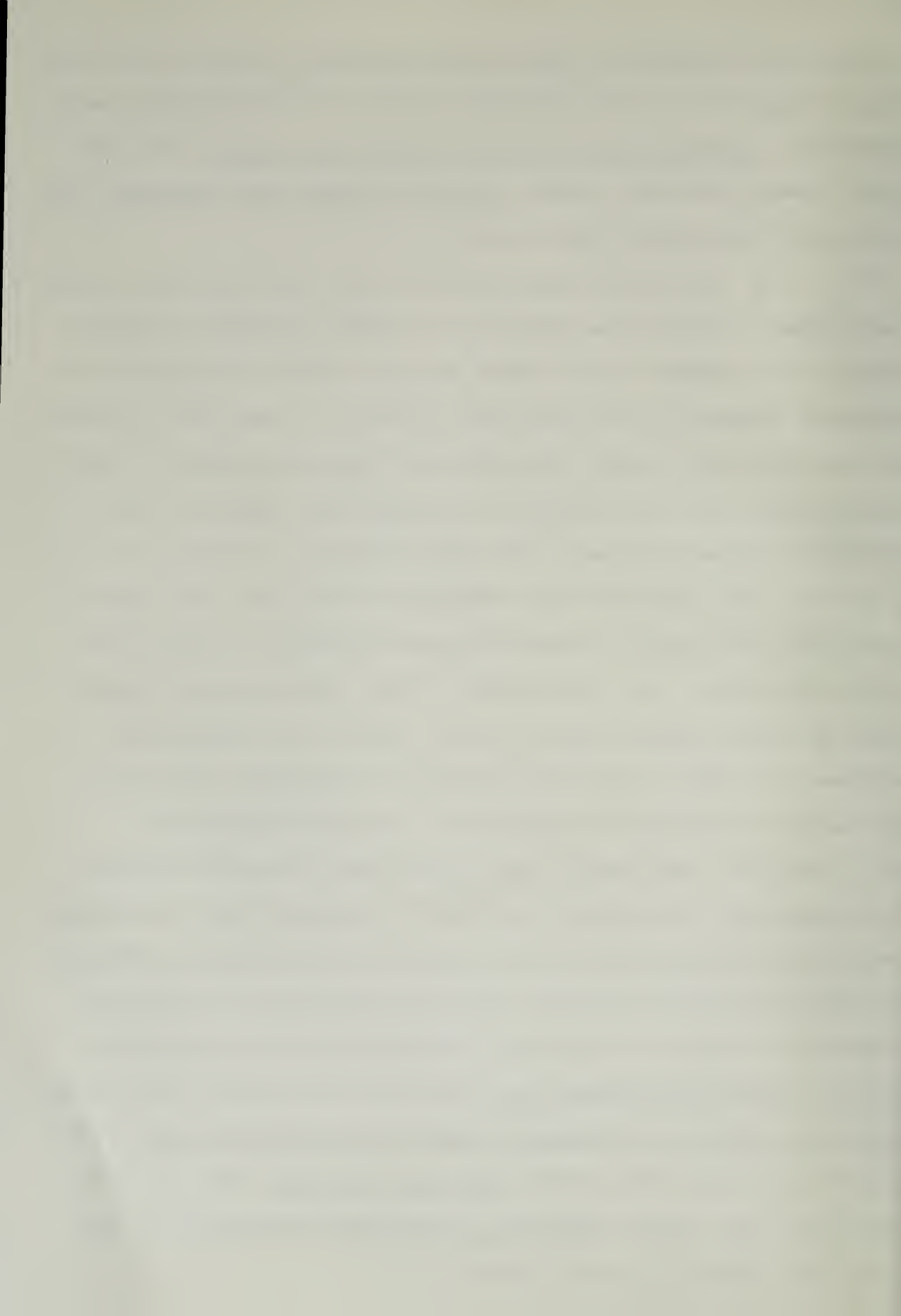
The claim of G.E. that there was no evidence that it required its dealers to advertise and sell at suggested list; that there was in fact city-wide selling of G.E. products at less than suggested list (R. 1956-1957), was directly contradicted by these exhibits. This evidence on its face proves appellants' contention that the large San Francisco dealers (like Hale) did not engage in price competition in advertising and tagging G.E. products, but followed list prices. (Pl. Ex. for Id. No. 5033). The Court excluded this evidence on the ground that the documents pertained to White Front and were thus irrelevant (Tr. 5258, 5266); but the documents contained statements of G.E. representatives referring to retail competition conditions in San Francisco, which is the gravamen of an antitrust case of this kind. It was reversible error to exclude this basic evidence. Continental Ore Corporation vs. Union Carbon & Carbide Corp., 370 U.S. 690, 702-703 (1963). Such evidence was also obviously





relevant and material as part of the overall picture of the conduct of appellee in the particular market, and should have been admitted. Standard Oil Co. of California vs. Moore, 251 F.2d 188, 205-210 (9th Cir. 1957); Flinkote Company vs. Lysfjord, 246 F.2d 368, 375-376 (9th Cir. 1957).

2. The Court improperly excluded the testimony of Mr. Vern Brown, former sales manager of Graybar, offered by appellants, that Graybar had to cease selling Hotpoint appliances to discount stores in San Francisco, in order to sell such products to Hale and other large department and appliance stores in the market area; and was required to discuss this decision with Hotpoint representatives. (See Specification of Errors, V, C, 3 and 4.) This evidence was excluded on the basis that appellants did not properly summarize such testimony in their Pre-trial Statement. (Tr. 6065-6070). But, appellants put appellees on notice before trial that Mr. Brown was a potential witness (R. 1367), and such testimony was directly related to the matters set forth in appellants' Pre-trial Statement. (R. 1086-1087, 1485-1486). The trial court therefore abused its discretion in refusing to allow Mr. Brown's vital testimony. Pre-trial procedures and rules should not be strictly construed or applied against the party offering evidence, but should be construed in favor of allowing a determination on the merits. Leh vs. General Petroleum Corp., 382 U.S. 54 (1966). See, also, Jones vs. Union Auto Indemnity Assoc. of Bloomington, Ill., 287 F.2d 27, 29 (10th Cir. 1961); Sher vs. De Haven, 199 F.2d 777, 782 (D.C. Cir. 1952); Clark vs. Pennsylvania Railway Co., 328 F.2d 591, 593-595 (1st Cir. 1964).



3. The Court erroneously excluded Pl. Ex. for Id. Nos. 4391, 4196 and 5052. (See Specification of Errors, V, C, 2). These exhibits showed that Hotpoint was in close contact with the local Hotpoint retailers through its field representatives; that it had exact knowledge who of the retailers were in Graybar's territory and what these retailers were doing in the retail market. In view of Hotpoint's defense that it had no knowledge or notice of the affairs of its distributor, or of the sales activities of Hotpoint dealers, or to whom Hotpoint appliances were being sold (R. 1959-1960), the evidence was certainly relevant and material. It was error to have excluded these exhibits.

D. The Court Committed Prejudicial Error  
In Excluding Evidence Proving Partici-  
pation By R.C.A. In The Conspiracy To  
Boycott Appellants:

(Specification of Errors, V, D.)

1. The Court erroneously rejected evidence that proved R.C.A. enforced its list prices upon its distributors (see Specification of Errors V, D, 1, 2, 4, 8 and 9.) It excluded Pl. Ex. for Id. Nos. 343 and 344 on the ground that a sufficient foundation had not been laid for their introduction (Tr. 4552, 4719, 6389). However, these exhibits were listed in Plaintiff's Separate Listing of Documents Pursuant To Local Rule 4(10), at page 2 (R. 1533, 1535). R.C.A. responded to this list in the Statement of Radio Corporation of America With Respect to Plaintiff's Proposed Exhibits. (R. 1514). At page 5 in this statement, appellee made the following admissions:

"RCA further objects to the admission of any such price sheets or correspondence other



than price sheets published by RCA or correspondence emanating from RCA on the ground that such other price sheets and correspondence is hearsay as to RCA and on the grounds of lack of foundation for its admission." (Emphasis added) (R. 1518).

On August 4, 1964, an attorney for appellants received a letter from counsel for R.C.A. enclosing what now have been identified as Pl. Ex. for Id. Nos. 343 and 344 (among other documents). The attorney's letter clearly showed that Exhibits 343 and 344 emanated from the files of R.C.A. Under California Code of Civil Procedure § 1942 (now Evidence Code § 1414), and F.R.C.P. Rule 43a, a foundation has thereby been established, and the documents are admissible. This was pointed out in Plaintiffs' Memorandum In Support Of Plaintiffs' Exhibit Nos. 343, 344, 1846, 1842-1844 (R. 1757).

These exhibits showed R.C.A.'s knowledge of Meyer's suggested price policy, and further evidenced that the distributor and R.C.A. were in close and constant communication with one another. Exhibit 343 also showed that R.C.A. had knowledge that the San Francisco R.C.A. dealers (such as Hale and Sterling) intended to maintain their retail prices at retail list. The documents also demonstrate the ability of the appellee and co-conspirator manufacturers and distributors to obtain the price sheets of the other co-conspirators.

Discount stores are identified by R.C.A. in Exhibit 343 as a "cut-price operation". Exhibit 344 contains evidence contradicting the testimony of Mr. Sanford, a managing agent of Hale and Meyer, that Meyer's price sheets were not discussed with the factory (R.C.A. or Whirlpool). These documents are substantial evidence that R.C.A. possessed thorough knowledge





of the San Francisco market situation and the activities of its distributor therein. They were therefore relevant and material, and it was prejudicial error to exclude them.

Pl. Ex. for Id. Nos. 348, 5060, 5061 and 5070 show that R.C.A.'s sales, distribution and advertising programs and policies required direct contact by R.C.A. with retailers, through the distributors, and knowledge by R.C.A. of the manner in which its advertising dollars were being utilized by its retailers. Exhibit No. 348 specifically shows that R.C.A. knew that Meyer's distribution policy was against cut-pricing by retailers from the list price, and directly contradicts testimony given at the trial by adverse witnesses. (Tr. 1242, 1334, 4533-4546, 4685-4688, 4694, 4697-4701, 4711-4712, 4729-4737, 4740, 4744-4745, 4767-4769, 4786-4788; R. 1924, 1927-1928).

Of special importance is Exhibit No. 5068 showing that R.C.A. required retailers to sign affidavits with respect to comparison price advertising, allowing the inference to be drawn that appellee, through its field representatives and its principal office, sought to control local retail advertising. The requirement for these signed affidavits stemmed from the activities of the E.I.A., of which R.C.A. is a member, and show appellee's willingness to participate in common programs and plans affecting marketing, with other television manufacturers. This evidence bears particularly on the excluded testimony of Mr. Saxon, Vice President of R.C.A., to the effect that his company did not engage in price competition in the sale of television sets. It is logical and rational to conclude that a company seeking to control the type of advertising done



locally can also participate in establishing a local fixed retail market under which its suggested retail list prices are followed and maintained.

The Court excluded other evidence of R.C.A.'s establishment of a fixed and rigid distribution program. It ruled that appellants could not establish that R.C.A. sold its products directly to retailers in California through its wholly-owned subsidiary, R.C.A.-Victor Distributing Corp., and that this company and Meyer respected each other's exclusive territorial rights in Southern and Northern California, respectively. This territorial allocation directly affected Manfree, who requested television sets from both R.C.A. and R.C.A.-Victor Distributing, which requests were refused on the ground that the factory did not sell to retailers or that Manfree must obtain the products from the San Francisco distributor. Appellant should have been able to acquire R.C.A. sets from it in Los Angeles, but the fixed market shown to exist by this evidence, prevented such opportunity.

2. Evidence that R.C.A. had direct knowledge of the activities of and contact with Hale and Lachman Bros. was rejected (Pl. Ex. for Id. Nos. 780, 1159, 363, 364 and 365). This evidence should not have been excluded, as it bore directly on the question of R.C.A.'s ability, and desire, to be informed of local market conditions, as further proof of its participation in the conspiracy.

3. The Court erred by excluding evidence that R.C.A. received written protests from Meyer concerning the supplying from Chicago of R.C.A.-Victor television sets to Spiegel Outlet

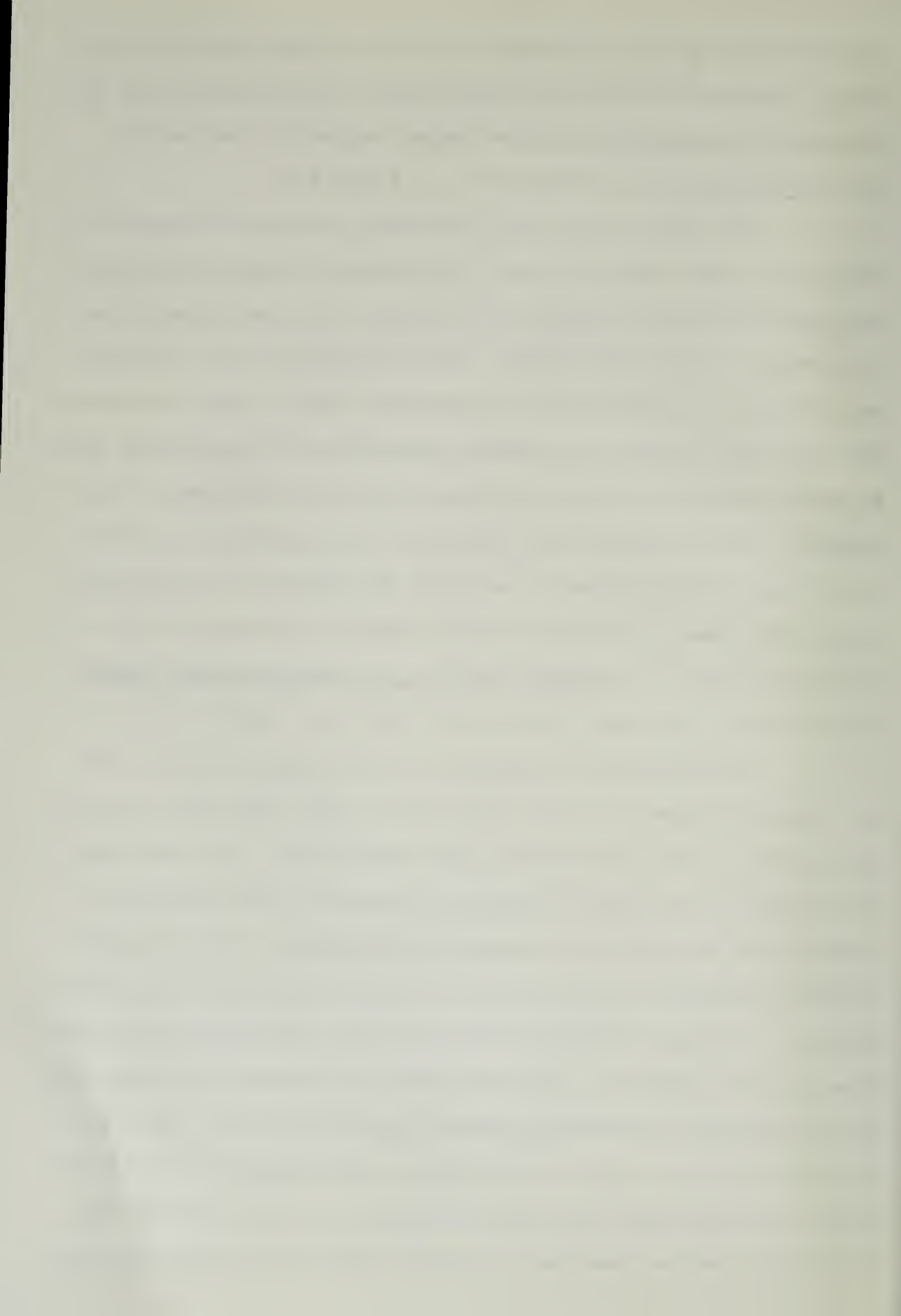


Stores in California, through the R.C.A.-Victor Distributing Corp., because such products were being advertised in the San Francisco newspapers at prices below suggested list prices (see Specification of Errors, V, D, 6 and 7.)

The Court ruled that evidence of Meyer's demands to R.C.A., in 1958, that it take the necessary steps to stop the sale of such sets by Spiegel in the San Francisco area, was irrelevant. (Tr. 4416-4418). But the evidence was material and relevant to appellants' allegations that a plan existed in San Francisco County to prevent advertising of television sets at below suggested prices, pursuant to which Manfree was boycotted. It is relevant and material for appellants to show that other "price-cutters" had been the subject of a similar plan. Such was an important (and logical) holding in this Court's opinion in Standard Oil Co. of California vs. Moore, 251 F.2d 108, at pages 208 to 210 (9th Cir. 1957).

The proffered testimony of Mr. Maag of R.C.A. and Mr. Meyer of Meyer, and Pl. Ex. for Id. Nos. 783 and 784 were also relevant and material to show that R.C.A. had knowledge or notice of the plan to maintain prices on its television sets in San Francisco at suggested list price. Mr. Maag was a Vice President of R.C.A. at the time he received the protests from Mr. P. Henry of Meyer concerning the supplying of television sets to Spiegel. His testimony was relevant and material, and constituted admissions against appellee R.C.A. The deposition testimony of Mr. A..H. Meyer, and Exhibits 783 and 784, were communications addressed directly to R.C.A., which Mr. Maag testified he received. Clearly appellants were entitled





to show R.C.A.'s knowledge of this plan to maintain suggested prices, as reflected by Meyer's violent reaction to the Spiegel "below-list" advertised prices. Mr. Maag's testimony was to the effect that R.C.A. was informed that local retailers were exerting pressure because of these ads. Mr. Meyer's testimony was that local retail dealers returned R.C.A. television sets to Meyer, after the Spiegel ads appeared in the San Francisco newspapers, showing RCA television for sale at below list prices (Appendix A, page xxv). Such was circumstantial evidence of pressure by San Francisco retailers upon their vendors to maintain retail list prices, and it was clearly prejudicial to appellants to exclude this evidence.

E. The Court Committed Prejudicial Error In Excluding Evidence Proving The Participation Of Whirlpool In The Conspiracy To Boycott Appellants:

(Specification of Errors, V, E.)

1. The Court erred in excluding Pl. Ex. for Id. No. 1714, significantly showing that Mr. Sol Golden, Whirlpool's Sales Manager (headquartered in Chicago), personally brought Meyer's attention to Manfree's request to Whirlpool for the right to buy its products: Mr. Golden was shown to have participated in providing Hale with factory "key account" advertising money (Pl. Ex. No. 685A-C).

2. The corporate affiliation between R.C.A. and Whirlpool should have been admitted in evidence (the proof of common directorships; Pl. Ex. for Id. No. 5086). Whirlpool products are called "RCA-Whirlpool", and the evidence showed that R.C.A. officers were directors of Whirlpool. This corporate inter-relationship was evidence germane to appellants'

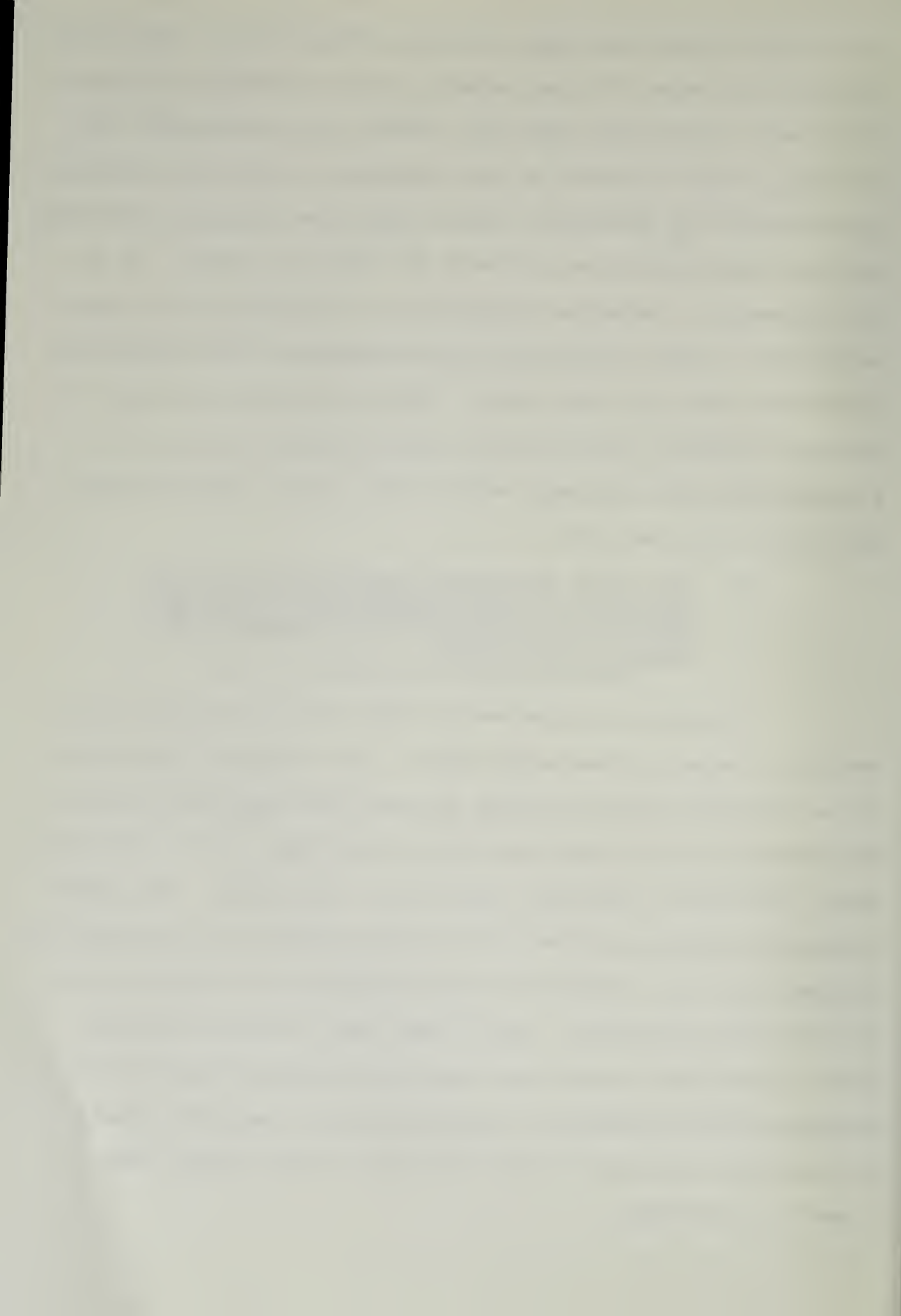


proof that Manfree not only could not obtain R.C.A. brand televisions from Meyer, but was equally unable to obtain Whirlpool brand major appliances from this common R.C.A./Whirlpool distributor. This evidence is also relevant in refuting arguments reflected in the Memorandum Opinion that the alleged conspiracy involved non-competitive products (R. 1912, at 1940). It is the tendency of companies engaged in the manufacture of major appliances to seek affiliation with companies that manufacture television sets, or vice versa. These companies are then in a position to sell a full line of major consumer products to distributors and retailers, which G.E., R.C.A., Westinghouse and Philco admittedly do.

F. The Court Committed Prejudicial Error In Excluding Evidence Proving The Participation Of Frigidaire In The Conspiracy To Boycott Appellants:

(Specification of Errors, V, F.)

Frigidaire contended at trial that it did not fix or establish retail prices after 1961. Yet its sales representatives discussed general market pricing with representatives of the retailers both before and after this time. (Tr. 4020-4023, 4050, 4104-4109, 4214-4215, 4299-4307, 4232-4234). The Court prevented appellants from introducing analysis of the prices of Lachman Bros. and Redlick to show uniformity of retail prices on Frigidaire products. See Pl. Ex. for Id. Nos. 4170 and 4178. Appellants should have been permitted to show by such evidence that Frigidaire's representatives discussed retail prices with retailers in San Francisco County, after 1961. (See Tr. 4100-4110).



G. The Court Committed Prejudicial Error  
In Excluding Evidence Proving The Par-  
ticipation Of Maytag In The Conspiracy  
To Boycott Appellants:

(Specification of Errors, V, G.)

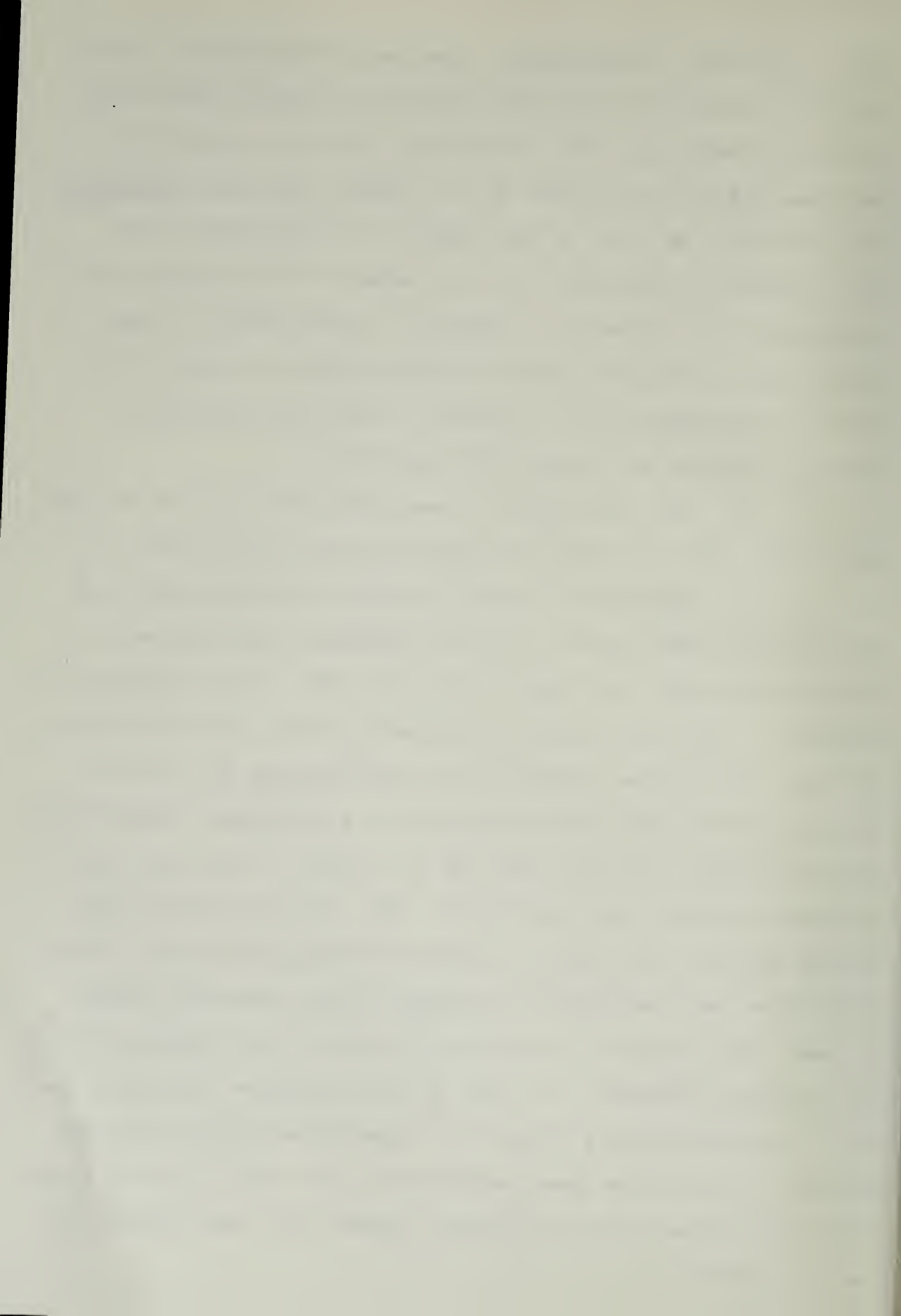
1. The Court excluded evidence of the statement of Maytag's managing agent, Mr. Mitchel, that Maytag West Coast would no longer sell to Manfree because it was no longer going to sell Maytag products to discount stores in San Francisco, due to a change in policy (see Specification of Errors, V, G, 2.) The Court rejected this important evidence showing that Maytag felt and reacted to the anti-competitive pressure exerted by Hale and the other retail co-conspirators, and had to change its policies as to whom it would sell. The ground of rejection was that appellants filed interrogatory answers stating that Maytag had joined a conspiracy in April, 1959. (R. 728, 731; 958, 961; see Appendix A, page xxxi). But clearly evidence going to the purposes and the reasons for a refusal to deal are always relevant, and the trial court cannot set an arbitrary cut-off date for such evidence. Continental Ore Corporation vs. Union Carbide & Carbon Corp., 370 U.S. 690, 701-702, 709-710 (1962); Standard Oil Co. vs. United States, 221 U.S. 1, 75, 76 (1911); Kansas City Star Co. vs. United States, 240 F.2d 645, 650-651 (8th Cir. 1957). This testimony related to the alleged reasons why Maytag would not sell to Manfree, and therefore the reasons why it chose to participate in the boycott conspiracy. It is no answer then to say that an answer to interrogatories set a cut-off date as to time, especially as the interrogatory answer clearly indicated that Maytag was engaged in anti-competitive conduct prior to April,





1959. (R. 691). Furthermore, appellants stressed the importance of evidence of the large purchase of Maytag appliances by Hale in February, 1959, coincident with the cut-off of Manfree, and this statement of Mr. Mitchel was made subsequent to that time. In view of the defense of Maytag West Coast (Mr. Mitchel's testimony that his company did not engage in a combination in restraint of trade (Tr. 3404-3405)), it was prejudicial to deny to appellants the probative value of Mr. Mitchel's statement to Mr. Freeman of Manfree concerning Maytag's reasons for cutting off appellant.

2. The Court erred in excluding Pl. Ex. for Id. Nos. 565, 1079, 1089, and 4165 (see Specification of Errors V, G, 1, 3 and 4.) Appellants sought to prove that Maytag did not want them to show prices in their newspaper advertisements of Maytag appliances (Pl. Ex. for Id. No. 565). This evidence was excluded. The Court further excluded evidence that in refusing to deal with Manfree, Maytag gave consideration to the fact that appellants were then operating as a so-called "closed-door" discount store. (Pl. Ex. for Id. No. 4165). The Court also excluded evidence (Pl. Ex. for Id. Nos. 1079 and 1089) that Maytag granted Hale special prices on Maytag appliances, which would have rebutted Maytag's defense to its admitted refusal to deal with Manfree, consisting in part of the drinking habits of a Manfree salesman. In view of this asserted "personal reason" for withdrawing a franchise, appellants should have been allowed to introduce these exhibits to show that in truth there were anti-competitive and illegal reasons for such refusal to deal by Maytag.



H. The Court Erroneously Excluded The  
Deposition Testimony Of Mr. Arthur  
Alpine, Deceased President Of U.S.E.  
(Specification of Errors, V, H.)

The deposition of Mr. Alpine, President of U.S.E. and Vice President of Manfree, contained extensive testimony concerning his requests to vendor representatives for major appliances and television sets, and the substance of his conversations with these various representatives. This evidence was rejected, primarily on the ground that appellees' counsel did not have an opportunity to study the memoranda and notes made by Mr. Alpine of these conversations, during the deposition. Mr. Alpine died before the completion of the deposition (Tr. 6223). The deposition was taken on March 15, 1961, April 1, 1961, April 3, 1961, April 4, 1961, April 5, 1961, was recessed to May 1, 1961 and continued to May 4, 1961. Appellees did not move (motion by Lancaster) for production of the memoranda until November 21, 1962, in relation to interrogatories filed in January, 1962 (R. 242). Appellees delayed an unreasonable period of time in attempting to obtain these memoranda, even assuming that it was proper to order them produced. Their untimely actions should not prejudice appellants' utilization of the deposition of Mr. Alpine. It is respectfully urged that F.R.C.P. Rule 32, and the decisions construing this Rule, require the party opposing the introduction of the deposition to show that he has acted with reasonable promptness and diligence. Such is not the case here. A similar matter was placed before the District Court in Re-Track Corp. vs. J. W. Speaker Corp., 212 F.Supp. 164 (E.D. Wis. 1962), where plaintiffs sought to prevent the introduction of a deposition they took of the defendant's deceased president



on the grounds of incompleteness (the witness refused to answer some questions and lacked information to respond to others), because they intended to ask many other questions before subsequent death of the deponent made that impossible, and because the deposition was for discovery and not the perpetuation of testimony. The Court stated, in response (212 F.Supp. 164, 169):

"The testimony, as far as it goes, was in response to cross-examination. Plaintiff has not indicated with particularity the area and scope of the matter not completely investigated. The Court is of the opinion that under the rule favoring the admissibility of evidence in doubtful cases the testimony of Mr. Speaker on deposition is admissible. See Paul v. American Surety Co. of New York, 18 F.R.D. 68 (S.D. Tex. 1955). Incompleteness and the freer range of questions and answers for the purpose of discovery are factors bearing on the weight of the testimony and not on its admissibility." (Emphasis added)

That the position taken by the District Courts is the prevailing one is shown from additional authority: Kaweitze vs. Ravich, 198 F.Supp. 841, 842 (E.D. Pa. 1961); Genyard vs. Jones, 18 F.R.D. 204, 205 (D.C. 1955); Paul vs. American Surety Co. of N.Y., 18 F.R.D. 68 (S.D. Tex. 1955); Inland Bonding Co. vs. Mainland National Bank, etc., 3 F.R.D. 438, 439 (D.N.J. 1944); Batelli vs. Kagan & Gaines Co., Inc., 236 F.2d 167, 169 (9th Cir. 1956); 4 Moore, Federal Practice (2nd Ed. 1966) para. 32.02 (p. 2203).

I. The Court Excluded Material Evidence Showing The Establishment Of A Conspiracy Of Retailers, Distributors And Manufacturers To Control Market Entry In The Retailing Of Major Appliances And Television Sets In San Francisco, And Showing The Scope Of This Conspiracy In The Boy-cotting Of Appellants:

(Specification of Errors, V, I.)





1. The Court rejected evidence of the meetings among the retail defendants whose purpose was to control retailer advertising in San Francisco, through the activities of the Home Furnishing Advisory Committee of the San Francisco B.B.B. (see Specification of Errors, V, I, 9.)

Pl. Ex. for Id. Nos. 453, 584, 390, 391, 396-A, 393-A, 400, 403 and 404 came from the files of Hale, Lachman Bros., and Redlick (see Specification of Errors, V, I, 9.) It is respectfully urged that this evidence is well within the ruling of Standard Oil Company of California vs. Moore, 251 F.2d 188, at 209:

"There is a great deal of additional evidence, however, tending to show parallel action by appellants, or actual contacts or communications between them, concerning other supplies, storage, marketing and pricing practices. The significance of evidence of this kind lies in its tendency to picture a business setting in a relationship which invites inferences favorable to Moore's position."

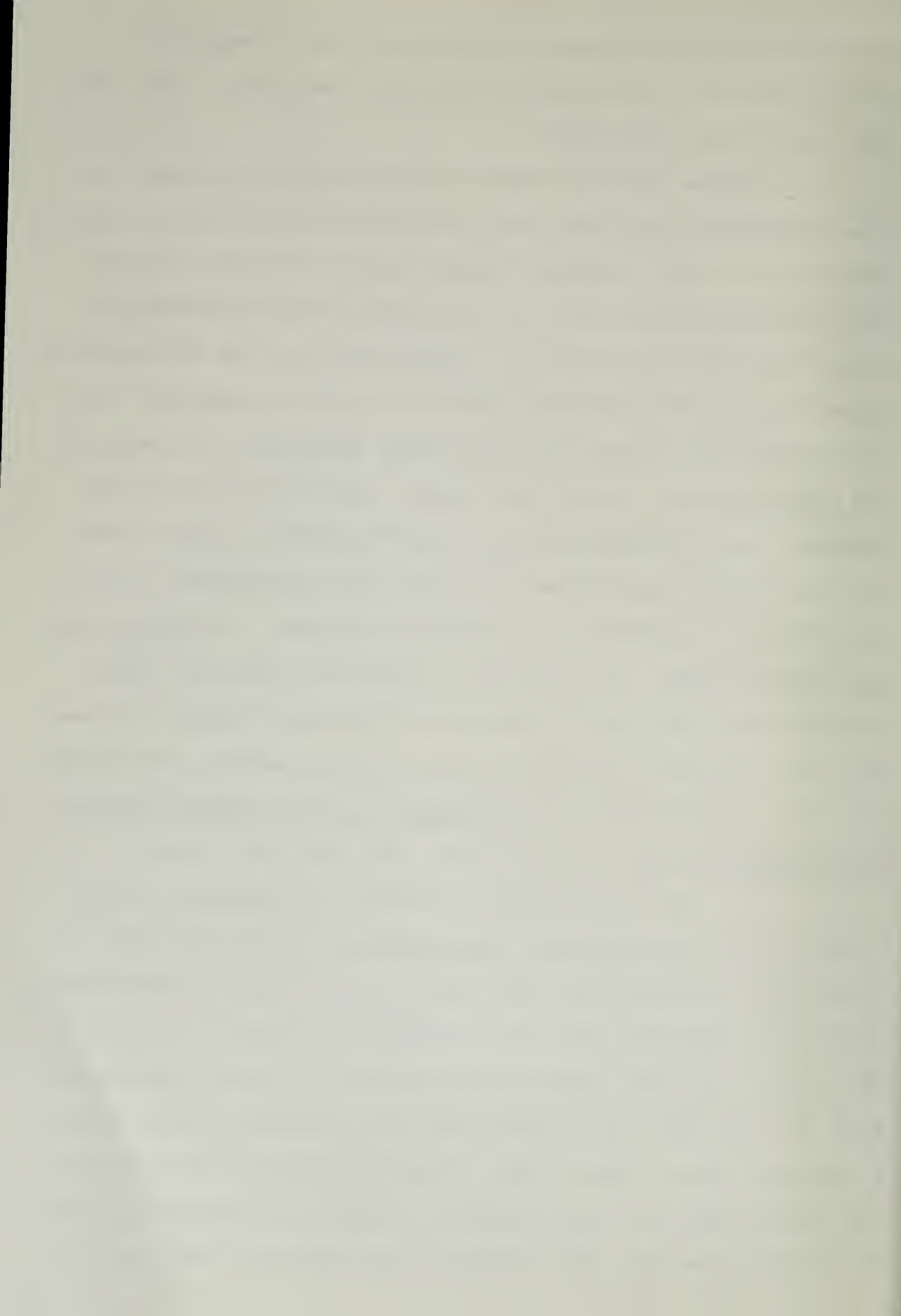
Appellants' theory is that part of the illegal combination contemplated excluding U.S.E. as an advertiser in the daily newspapers in San Francisco County. This, of course, is necessary, if the retail list prices of the distributors and manufacturers are to be maintained, since the discount stores do not follow these list prices. The plan was successful as to the morning newspapers, and evidence concerning that aspect of the conspiracy was admitted as to all defendants (Tr. 2082, 2086, 2091, 2111-2113). The plan of exclusion was shown to be unsuccessful as to the San Francisco News Call-Bulletin, but a member of the retail group which adopted the uniform advertising code, Mr. R. E. Schreck of Sterling, was shown to have



contacted the Call-Bulletin concerning U.S.E. advertising shortly prior to the filing of the first complaint. (Tr. 1761-1768, 2327-2333, 5689-5700).

These exhibits were therefore further relevant to show attempts by appellees and co-conspirators to exclude appellants from the San Francisco retail market for such products, and to prevent appellants from obtaining effective newspaper advertising of such products. It was for the jury to determine, based upon all the evidence, whether or not the admitted meeting between Mr. Schreck, and Mr. Wally Brooks, Mr. Al Leary of the Call-Bulletin, and Mr. Bob Weiss, Sterling's advertising director, at the Olympic Club in San Francisco in June, 1960 (Tr. 5692-5700) was pursuant to a plan and arrangement to exclude U.S.E.'s advertising from that newspaper. See Esco Corp. vs. United States, 340 F.2d 1000, 1005-1007 (9th Cir. 1965). The apparent inability of witnesses Schreck and Leary to remember what precisely occurred at that meeting permits inferences in favor of appellants. See Girardi vs. Gates Rubber Company Sales Division, Inc., 325 F.2d 196, 203 (9th Cir. 1963).

2. The Court erred in excluding statements of Mr. Wilcox of the San Francisco Call-Bulletin to Mr. Mittelman of U.S.E. that attempts had been made to keep U.S.E.'s advertising out of his newspaper (see Specification of Errors, V, I, 10.) Throughout the trial appellees attempted to create the impression for the jury, that appellants had attempted to manufacture a lawsuit, out of whole cloth. They attempted to detract from the significance of their refusals to deal with Manfree in 1960, by claiming that the 1960 letters from appellant were sent to



them at the instigation of appellants' attorney, and therefore were not sent in good faith. (Cf. Standard Oil Co. of California vs. Moore, supra, at page 201). The statements made by Mr. Wilcox, an officer of the Call-Bulletin, about U.S.E. advertising, therefore were relevant and material on the issue of appellants' good faith in bringing this action, and were specifically offered on this ground (Tr. 2131-2132). Where the good faith of a party, or the reasonableness of its conduct is put in issue, hearsay statements upon which it acted may be shown. Central Heights Imp. Co. vs. Memorial Park, 40 C.A. 2d 591, 609 (1940); Gilbert vs. Gilbert, 98 C.A. 2d 444, 446 (1950).

J. The Court Erred In Excluding Evidence That Appellees Entered Into Special And Favored Arrangements With Hale And Other Retail Defendants:

(Specifications of Errors, V: A, 3; B, 8; C, 6; D, 5; E, 3; F, 1; G, 4.)

The evidence (summarized in the specifications noted) establishing special arrangements between appellees and the retail defendants proved these parties had a common purpose and plan to control the market. Each discriminatory arrangement proved the willingness by the parties to support unlawful undertakings, whereby special advertising funds and special prices are afforded only to those who support the basic program of maintaining the San Francisco market as a list price, high margin area. United States vs. Paramount Pictures, Inc., 334 U.S. 131 (1940); American Tobacco Co. vs. United States, 328 U.S. 781 (1946).





THE COURT ERRED IN EXCLUDING EVIDENCE  
OF APPELLANTS' WRITTEN REQUESTS TO  
VENDORS FOR PRODUCTS, AND OF STATEMENTS  
BY THE VENDORS' REPRESENTATIVES TO  
OFFICERS OF APPELLANTS CONCERNING THESE  
REQUESTS

(Specification of Errors, V, I, 2 and 7.)

1. The basis of the Court's rejection of conversations between appellants' managing agents and representatives of appellees or co-conspirators was an asserted lack of foundation as to the authority of these representatives to bind his corporate principal. In so doing, it adopted a very narrow rule, for these representatives were clearly shown:

(i) to have authority to take orders for products involved; (ii) to be responsible for submitting requests for franchises to management; (iii) to be responsible for the pricing and delivery of goods; (iv) to have participated in top-level sales and management conferences; and (v) to have exercised supervisory control over sales in their jurisdiction. All of the persons to whom appellants addressed their requests were certainly in a position to and ordinarily would carry these requests to others in the normal course of their business affairs. Sales representatives of the vendors involved were shown to have been given wide discretion in the exercise of their affairs. They clearly were the ears and antennae of the corporate defendants and their statements should be admissible against such parties. See Newark Insurance Co. vs. Sartain, 20 F.R.D. 583 (N.D.Cal. 1957) at 584-586, and the review of authorities contained therein, as well as the authorities cited in appellants' Memorandum Concerning Admissibility



In Evidence of Conversations Between Bernard Freeman And Certain Representatives, etc. (R. 1751).

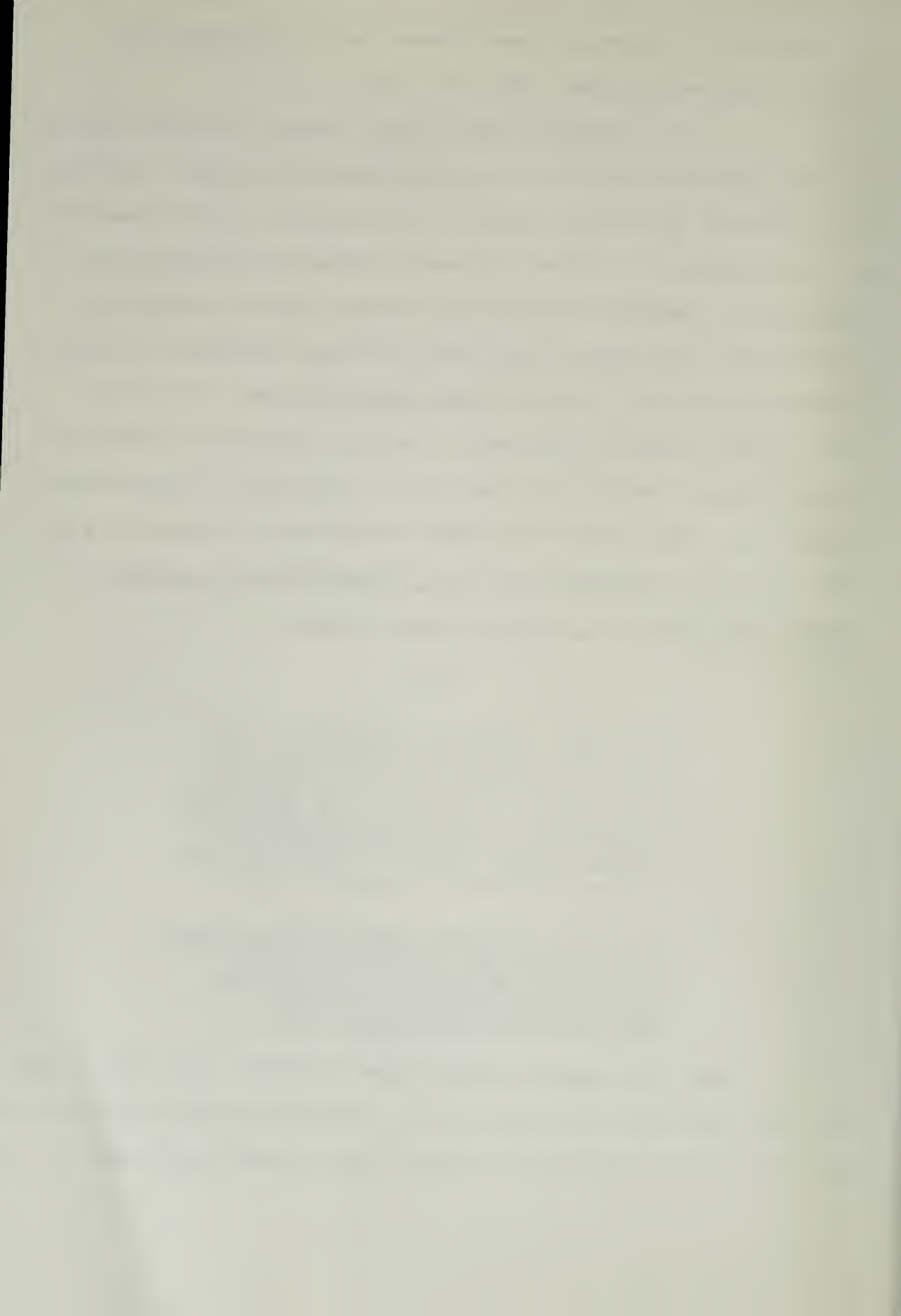
2. In rejecting appellants' request letters written in 1960, 1961 and 1963 to co-conspirators Lancaster, Motorola, Westinghouse, Sylvania, Basford, and Graybar, and to Cezan Co. in Los Angeles, it refused relevant evidence demonstrating appellants' complete inability to obtain leading brands of merchandise, including lines sold by these companies. Failure to receive product, despite bona fide requests, is a vital part of the mosaic of evidence proving a concerted refusal to deal. A group refusal to deal was the gravamen of appellants' action, and they should have been permitted to establish all such refusals. Standard Oil Co. of California vs. Moore, supra; Esco Corp. vs. United States, supra.

### XIII

THE COURT ERRED IN EXCLUDING, OR NOT APPLYING, FURTHER SUBSTANTIAL AND MATERIAL EVIDENCE SHOWING THE ESTABLISHMENT OF A CONSPIRACY BETWEEN THE APPELLEE AND CO-CONSPIRATOR RETAILERS, DISTRIBUTORS, AND MANUFACTURERS, TO CONTROL MARKET ENTRY IN SAN FRANCISCO  
(Specification of Errors V, I.)

- A. The Court Excluded Evidence That Meyer Investigated The Source Of R.C.A. Televisions Being Sold By Discount Stores In Northern California:  
(Specification of Errors V, I, 3.)

The jury could clearly infer from Pl. Ex. for Id. Nos. 787, 788, 789 and 790, that R.C.A.'s Northern California distributor was actively seeking to control and prevent purchases of R.C.



televisions by discount stores. Such is obviously relevant evidence showing a plan to prevent discount stores in San Francisco from obtaining television sets. The signators to the letters contained in these exhibits were assisting retailer Hale, by finding the sources of R.C.A. televisions appearing in the inventories of competing retailers who "cut prices"; consequently, this evidence was an important part of the proof of the establishment of a conspiracy to prevent discount stores from being able to obtain such products. See Esco Corp. vs. United States, 340 F.2d 1000 (9th Cir. 1965).

B. The Court Excluded Evidence That Westinghouse Believed That It Could Not Sell Both The Large Department Stores And The Discount Stores In San Francisco County, And That Macy's Requested There Be No Price Competition On Westinghouse Appliances:

(Specification of Errors V, I, 4)

The Court ruled that Pl. Ex. for Id. Nos 352, 479-481, and the expected testimony of Mr. Hangauer of Westinghouse concerning them, to be irrelevant, as they appeared to be based upon hearsay reports or rumors. (Tr. 6148, 6158). But all companies' sales and distribution policies are based upon information obtained from various sources in the market, and the information reflected here was particularly material and relevant to appellants' case, in showing that Westinghouse believed that it could not sell to the discount stores and the large department stores at the same time, because of strong adverse reaction from the latter. Intraoffice reports of co-conspirators are extremely relevant and material, and are admissible as evidence. Schine Chain Theatres, Inc. vs. United States, 334 U.S. 110, 116-117 (1948).





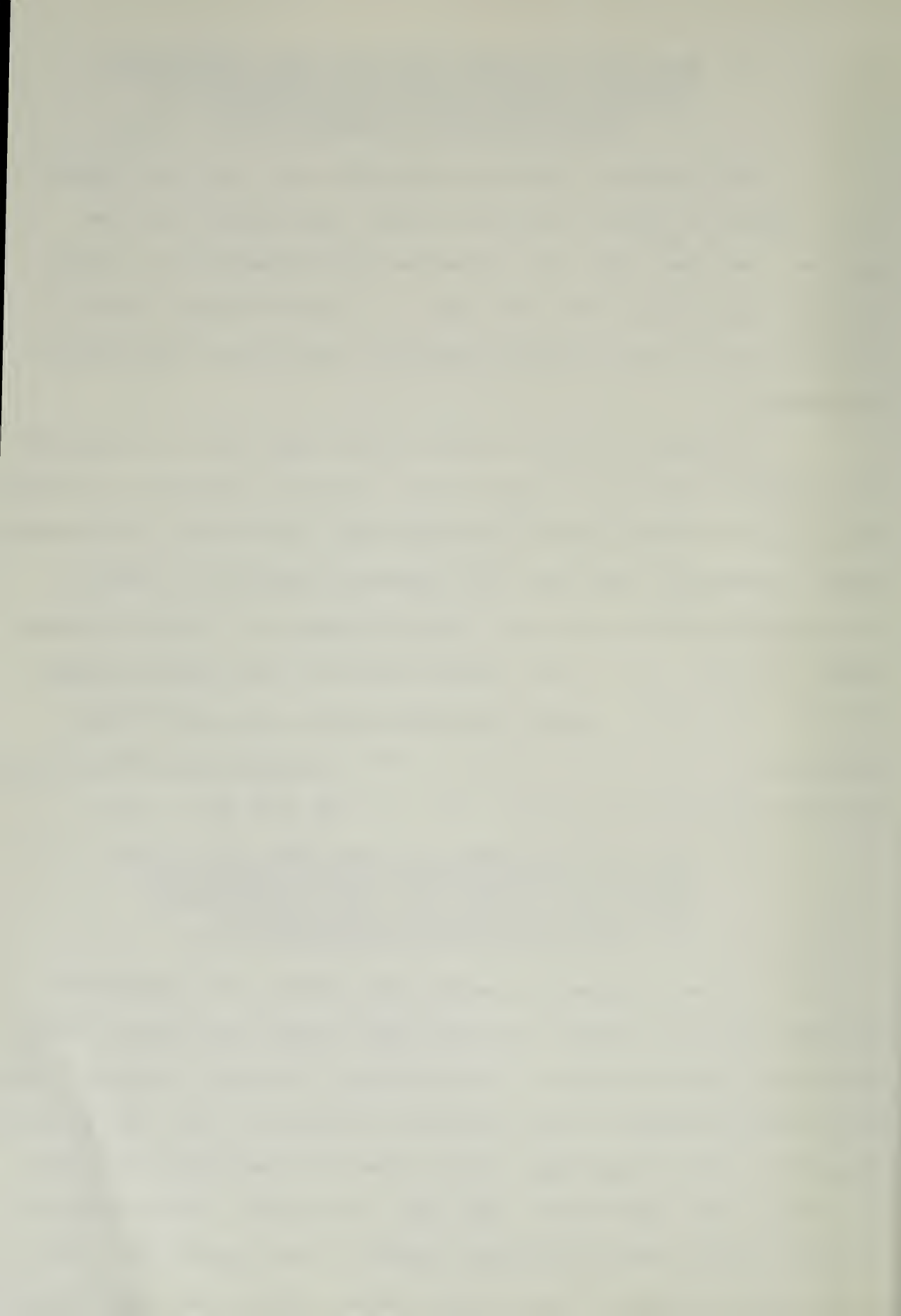
C. The Court Excluded Evidence That The Boycott Prevented Manfree From Obtaining Products From Outside The San Francisco Area:  
(Specification of Errors V,1,5; V,D,4)

The evidence offered showed that not only were appellants unable to obtain Norge and R.C.A. appliances from Los Angeles, but also that they attempted unsuccessfully to obtain Hotpoint appliances from that area. As shown before, these refusals to sell were allegedly based on territorial distribution agreements.

Evidence of such refusals based upon such arrangements were clearly relevant to appellants' proof of a boycott conspiracy, one purpose of which was to maintain such territorial arrangements. These agreements, when part of a boycott conspiracy, clearly constitute unlawful activity. United States vs. Arnold, Schwinn & Co., 87 S.Ct. 1856 (1967); White Motor Co. vs. United States, 272 U.S. 253 (1963); Walker Distributing Co. vs. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963); Girardi vs. Gates Rubber Company Sales Division, Inc., 325 F.2d 196 (9th Cir. 1963).

D. The Court Excluded Evidence That The Vendor Appellees And Co-conspirators Engaged In Substantial Trade With Other Departments Of U.S.E., While Boycotting Manfree:  
(Specification of Errors V, I, 8.)

It was uniquely relevant and material for appellants to show that the refusals to deal with Manfree were based solely upon its classification as a price-cutter on major consumer items rather than because of any business infirmity or lack of customer exposure. Thus, appellants should have been permitted to prove, as offered (Tr. 5857-5859, 5863-5866, 6559-6601), that the same vendors rigidly denying Manfree product, were engaged in a very strong and profitable trade in the retailing of small appliances



and radios with other concessionaires of U.S.E., situated on the same premises. It is a matter of logic that the ability to so freely obtain small appliances demonstrates that the refusals to deal had other basis than the manner in which U.S.E. and its departments (Manfree included) conducted business. See Standard Oil Co. of California vs. Moore, 251 F.2d 188, 209-212 (9th Cir. 1957).

E. The Court Excluded Relevant Evidence Showing The Factory Appellees Met In National Trade Associations And Entered Into Agreements In Restraint Of Trade:

(Specification of Errors, V, I, 11, 12, 13, 14 and 15.)

Appellants offered documentary evidence (summarized in the specifications noted) which showed that the factory appellees, during the period of time involved, (a) as members of N.E.M.A. agreed to a common, uniform definition of "discount stores"; agreed not to divulge retail market statistical information gathered by N.E.M.A. to "outsiders"; (b) as members of N.E.M.A. and/or A.H.L.M.A. agreed to exchange information as to retail sales of their respective consumer products on a nation-wide basis, by price classification; (c) agreed that marketing matters common to manufacturers of major electrical appliances, home laundry equipment, and television sets would be handled in trade association meetings attended by representatives of the trade associations (e.g., N.E.M.A., A.H.L.M.A., and E.I.A.) to which such manufacturers belong; (d) as members of A.H.L.M.A. agreed not to seek Federal Trade Commission review or approval of A.H.L.M.A.'s so-called "advertising code".

This evidence is all material to show that appellants



faced a fixed and rigid distribution system with national origins, making the boycott one of common purpose and thus easy to enforce and administer. The evidence showed that Borg-Warner, G.E., Frigida Hotpoint, and Whirlpool, together with others, discussed the common definition to be applied to "discount stores". In discussing this matter, the G.E. representatives pointed out that a common feature of the discount store was its "low price" or "cut price" policy. (Pl. Ex. for Id. Nos. 2093-2094).

That the associations were not simply statistical trade groups, is shown by the evidence that the members of N.E.M.A. and A.H.L.M.A. refused to make their trade information available to non-members; exchanged price classification information; promulgated their own advertising codes which they sought to enforce on retailers; met to discuss price information; and sought to establish a fixed nationwide distribution system operating at fixed prices (Pl. Ex. for Id. No. 431, Appendix B). All this evidence was admissible evidence, as stated in American Tobacco Company vs. United States, 147 F.2d 93 (6th Cir. 1944), at 119:

"The only purpose for which the Court admitted the evidence was to show that the appellants had an opportunity of 'gathering together and communicating between each other a plan or plans alleged to constitute the conspiracy.' This evidence, as well as that indicating that appellants controlled the organization, was properly admissible for the purpose of showing that the Association served as a means of communication and gave the appellants an opportunity to conspire and act in combination. See Minner vs. United States, 10 Cir., 57 F.2d 506; Kanner vs. United States 7 Cir., 34 F.2d 863." (emphasis added)





XIV

THE COURT ERRED IN EXCLUDING FINANCIAL STUDIES SHOWING THAT HALE AND THE OTHER RETAILER CO-CONSPIRATORS MAINTAINED MANUFACTURERS' AND DISTRIBUTORS' LIST PRICES AS THEIR TAG PRICES

(Specification of Errors, V, I, 16)

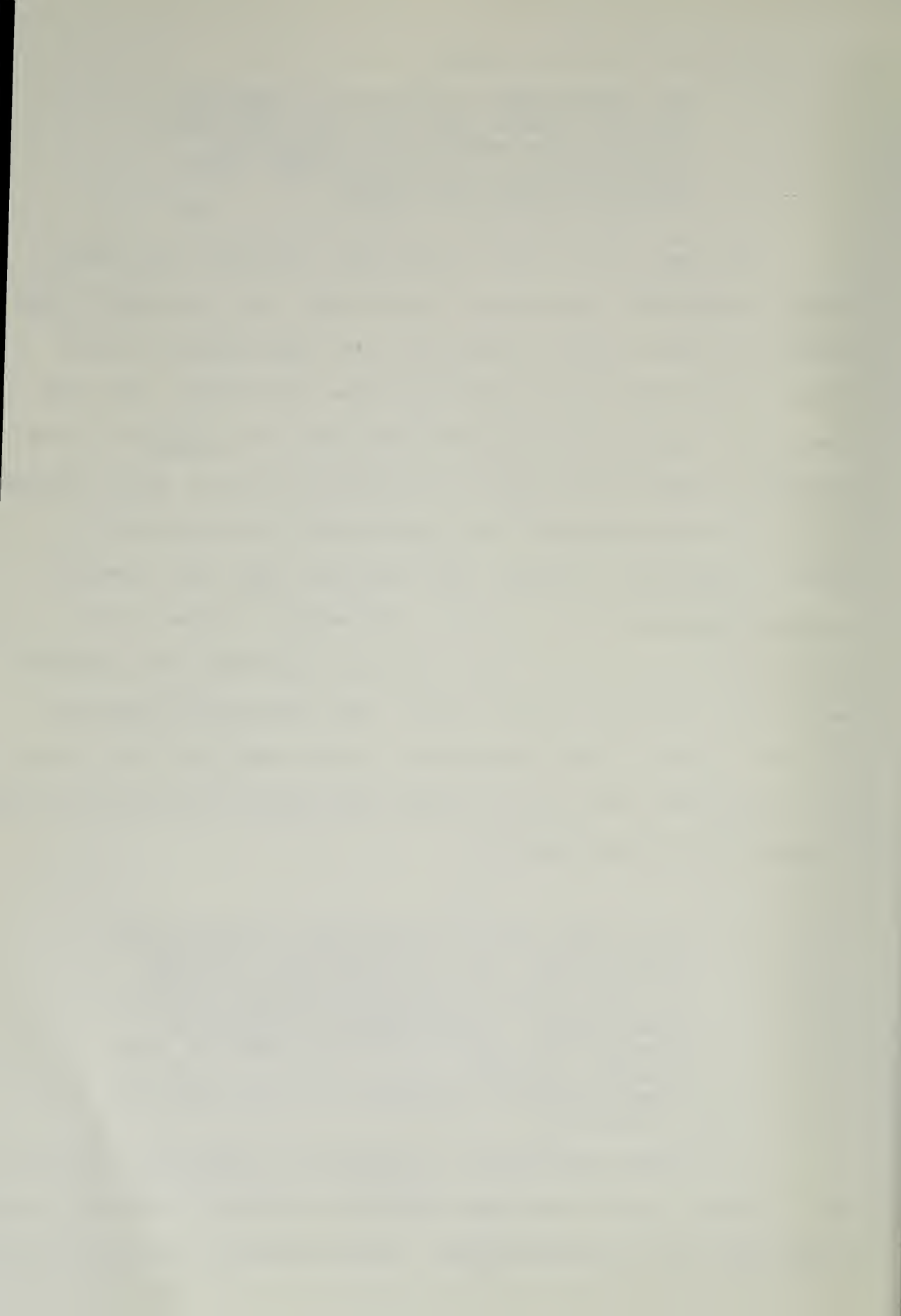
Pl. Ex. for Id. Nos. 1561-1578; 1579-1681 and 1560, studies prepared by appellants' accountant, were excluded on the ground that such pricing studies did not specifically relate only to the San Francisco stores of these retailers. But even assuming so, clearly the relevant issue was the policy of these companies of maintaining their tag prices at prices which followed the list prices promulgated by appellee and co-conspirator . vendors, regardless of where (San Francisco and other areas) the stores implemented this plan. Therefore, studies, the bulk of which pertained to San Francisco (although not entirely based on San Francisco store sales), was relevant and material show such policy of such retailers. It is urged that the objections urged below went to the weight and not to the admissibility of these retail price studies.

XV

THE COURT EXCLUDED APPELLANTS' TABULATIONS WHICH SHOWED THAT THE RETAILERS FOLLOWED FACTORY LIST PRICES, THE AMOUNT OF TRADE AND PREFERENTIAL DEALINGS BETWEEN THE CO-CONSPIRATORS, THEIR POWER TO ENFORCE A BOYCOTT AND PROOF OF ITS EXISTENCE BY ITS ECONOMIC EFFECT

(Specification of Errors V, I, 17, 18, 19 and 20)

1. These tabulations, prepared by appellant's accountant, Mr. Honig, were based upon documents produced from the files of appellees and co-conspirators. They showed the relative market

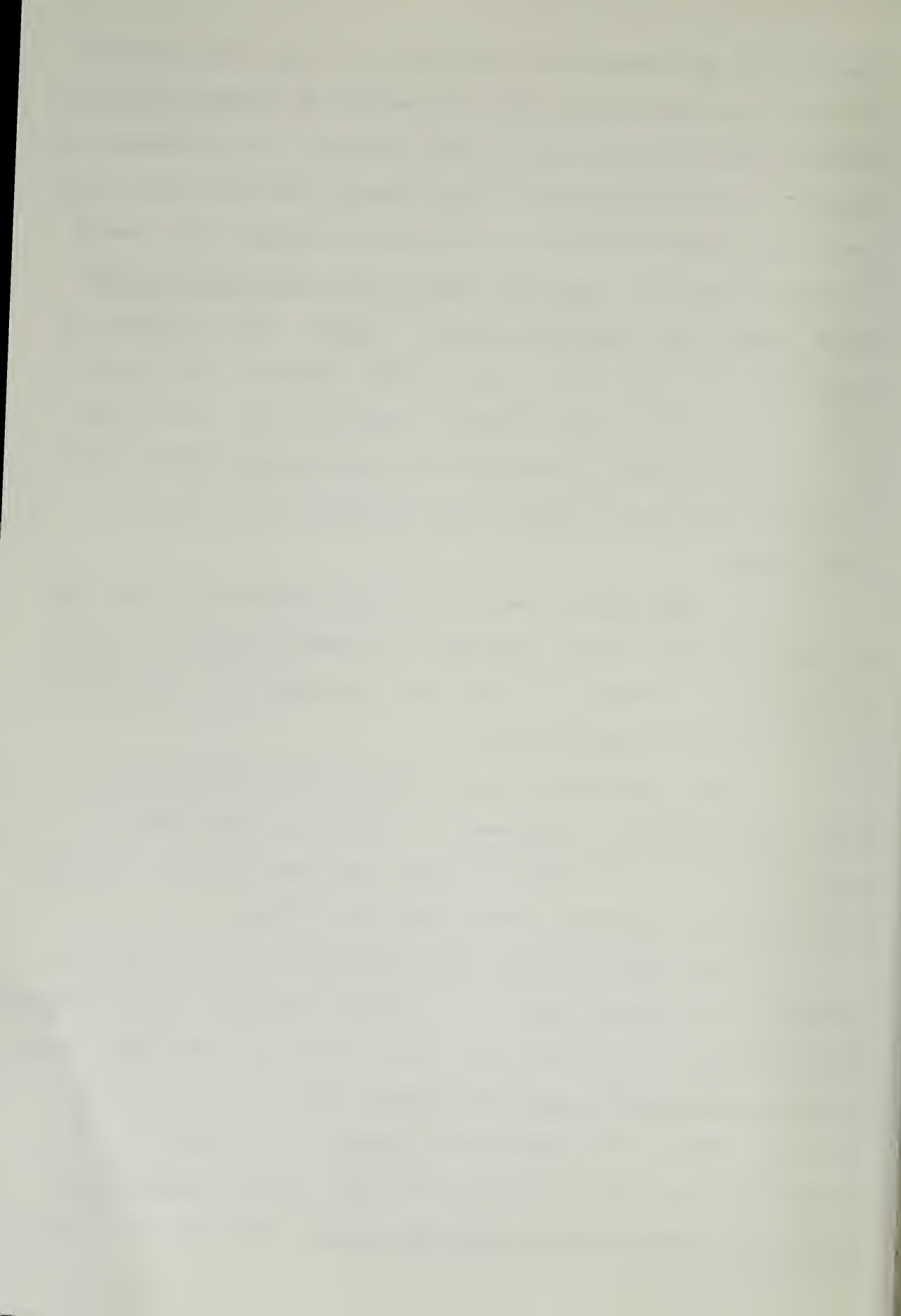


power of the co-conspirator retailers, the size and strength of their purchasing power, and the volume of product transfers between such retailers, among other things. This evidence was relevant to show economically how leverage could be exerted by these retailers to create and maintain a boycott, and should have been admitted. American Tobacco Co. vs. United States, supra; Lessig vs. Tidewater Oil Co., supra. This evidence is contained in Pl. Ex. for Id. Nos. 4334, 4336 and 4340 (dollar volume of purchases from vendors); and Nos. 4335, 4337, 4339, 1491 and 1492 (study of co-operative advertising credits from vendors to retailers, showing many instances of fully-paid advertising).

2. The Court also erroneously excluded Pl. Ex. for Id. Nos. 1500 and 1500-1, showing the marked decline in sales and profits of Manfree in 1957-1964, following the institution of the complete boycott against it.

This particular study clearly showed the boycott's effect upon Manfree's business in relation to the brands of appellee and co-conspirator vendors, and was therefore further proof of their violation of the antitrust laws.

This evidence was highly probative of the complete success of the scheme and plan to boycott Manfree, and to exclude this evidence on the liability issue constitutes manifest error. Haverhill Gazette Co. vs. Union Leader Corp., 333 F.2d 798, (1st Cir. 1964). Evidence of the impact of a conspiracy is relevant to the proof of the conspiracy itself. Continental Ore Co. vs. Union Carbide and Carbon Corp., 370 U.S. 690 (1962).



As the First Circuit stated in Haverhill Gazette Co., at 802:  
"In a private antitrust action, liability and damages are not separate."

XVI

THE COURT ERRED IN EXCLUDING EVIDENCE  
THAT ANOTHER SAN FRANCISCO RETAIL STORE  
(KLOR'S) WAS SUBJECTED TO A BOYCOTT INVOLVING G.E., R.C.A., PHILCO, ZENITH  
AND WHIRLPOOL PRODUCTS, AMONG OTHERS  
(Specification of Errors V, I, 21 and 22)

Appellants offered as a witness Mr. Sam Fractenberg, an officer of Klor's, Inc., a former retail store in direct competition with Hale. Mr. Fractenberg was also formerly a salesman for Admiral products, during this period he was asked by Hale representatives to identify for them to whom in San Francisco Admiral was selling its products. As a former representative of Klor's, Mr. Fractenberg was to testify concerning Klor's inability to obtain R.C.A. television, Philco appliances, and other major appliances and television lines, because of pressure on the vendors from Hale, its next-door competitor.

The record shows that the Court allowed appellants to call Mr. George Klor, former president of Klor's (Tr. 1359), but appellants advised the Court that he was ill (Tr. 5680), and that Mr. Fractenberg was able to testify to the many matters upon which Mr. Klor would have testified. However, the Court refused to permit appellants to call Mr. Fractenberg, because he had not been listed as a potential witness (Tr. 5682-5683).

Under the Moore case, proof of the similar boycotting of another dealer in the market is relevant evidence of the presence of a conspiratorial group, controlling market entry. This





evidence of that nature should have been admitted.

XVII

IT WAS ERROR TO REFUSE TO APPLY THE ORAL  
DECLARATIONS OF REPRESENTATIVES OF ONE  
CONSPIRATOR AGAINST ALL; AND TO REFUSE  
TO ALLOW SUCH DECLARATIONS PROBATIVE VALUE  
(Specification of Errors, VI. )

A. In Applying The Evidence, No Distinction  
Should Be Made Between Oral Declarations  
And Writings:

The Court made a distinction between the admissibility of documentary evidence offered as to one conspirator, and oral declarations so offered, as to applying such evidence against all the defendants in the case. It is urged that there is no such distinction in the law of conspiracy. The prima facie establishment of a conspiracy allows all declarations of one co-conspirator admissible against all whether such declarations are written or oral. Standard Oil Co. of California vs. Moore, 251 F.2d at 218-219 (9th Cir. 1957).

B. The Statements Of Sales Representatives  
Within The Scope Of Their Authority Were  
Admissions Against Their Principal:  
(Specification of Errors VI, A. )

Mr. Gentile was "field sales representative" for the entire State of California for R.C.A. at the time of his deposition (Tr. 4645-4648, 4748-4750, 4753-4754). Thus it was error to rule that his admissions would not bind R.C.A. (See Tr. 4753). Similarly, witness Wade Brightbill had the same position with R.C.A. at the time of his testimony (Tr. 4754, 4760-4761, 4799-4802), and his admissions were applicable against that appellee (See Tr. 4801).



Such witnesses, at the time of making the statements which appellants sought to have applied against their principals, were employed by such parties as managing agents. Thus, these declarations should have been admitted into evidence against such principals. See Gibbs vs. RCA Victor Distributing Corporation, 214 F.Supp. 52, 53 (W.D. Mo. 1963); Newark Insurance Company vs. Sartain, 20 F.R.D. 583 (N.D. Cal. 1957).

C. The Court Erred In Ruling That Managing Agents Of Defendants, Who Had Left The Employ Of That Party By Time Of Trial, Were Not Representatives Of Adverse Parties Under F.R.C.P. Rule 43(b):  
(Specification of Errors VI, B.)

It is respectfully submitted that Rule 43(b) allows a party to call a former managing agent of an opposing party, as an adverse witness. First, this would seem implicit in the Federal Rules by reference to Rule 26(d)(2) cited above. Secondly, Rule 43(a) governs the competency of witnesses, and holds that the most liberal rule of admissibility should govern in questions of this nature. Clearly the rule in California is that former employees or officers may be called as an adverse witness under the similar provisions of C.C.P. 2055 (now Cal. Ev. Code §776). Wells vs. Lloyd, 35 C.A.2d 6 (1939); Scott vs. Del Monte Properties, 140 C.A.2d 756 (1956). Thus it was error for the Court to hold that the testimony of witness Mr. Sanford would not bind Hale (Tr. 504-507, 518-521 at Tr. 518), or similar holdings as categorized in VI B, 1 of the Specification of Errors.



D. The Court Erred In Not Allowing Appellants To Examine Witnesses Who Were Managing Agents Of Adverse Parties As Adverse And Hostile Witnesses:

(Specification of Errors VI, C.)

Representatives of dismissed defendants, alleged to have participated in a conspiracy, are thus hostile and adverse witnesses to the appellants, who called them in the six instances summarized in the Specification of Errors VI, C. See United States vs. Uarte, 175 F.2d 110 (9th Cir. 1949).

XVIII

APPELLANTS SHOULD HAVE BEEN, BUT WERE NOT, PERMITTED FULL SCOPE OF CROSS-EXAMINATION, REHABILITATION, AND REBUTTAL ON ISSUES RAISED BY APPELLEES IN THEIR EXAMINATIONS OF WITNESSES.

(Specification of Errors VII)

The witnesses listed in the Specification of Errors (with the exception of Mr. Freeman, an officer of appellants), were hostile and adverse witnesses, since they were at the times of the acts complained of, agents and employees of the various appellees and co-conspirators. Under F.R.C.P. Rule 43(b), as noted above, appellants should have had the benefit of the full scope of leading and impeaching questions, which they were denied in the instances noted.

As to Mr. Freeman, appellee G.E., on its cross-examination, introduced G.E. Ex. No. 8350(A-E) relating to certain allegedly dishonest merchandising practices of Manfree, and cross-examined Mr. Freeman on that subject (Tr. 6030-6036). However, on re-direct examination, the Court prevented appellants from rehabilitating the witness on that point, and from introducing evidence that such practices were common among other





retail merchants (see Pl. Ex. for Id. No. 5111; Tr. 6055-6057).

XIX

PREJUDICIAL ERRORS WERE COMMITTED IN  
PRE-TRIAL ORDERS OF THE COURT, RELAT-  
ING TO THE DISCOVERY OF EVIDENCE  
(Specification of Errors VIII)

A. Appellants Should Have Been Permitted  
Discovery Of All Intra-Company Memoranda  
Or Other Writings In The Possession Of  
Vendor Appellees Which Concerned Appel-  
lants, And/Or The Retail Defendants:

Appellants served a subpoena duces tecum upon managing agents of appellees Frigidaire (Mr. John Shaw, on January 18, 1963), and R.C.A. (Mr. Gentile, on March 14, 1963) in connection with their depositions, which, by a common appendix, required such agents to produce the documents described above as their companies might hold in its files. (As to Frigidaire, see R. 302-307; as to R.C.A., see R. 327a-332). When such documents were not so produced, appellants filed Motion(s) for An Order To Show Cause Why Documents Should Not Be Produced by these parties. (As to Frigidaire, see R. 298-322; as to R.C.A., see R. 323-352). After hearing (Pre-Trial Hearing of April 17, 1964, P.Tr. 2-17, 21-23, 25-84), the Court denied appellants' motions, and entered orders which qualified the documents they were to produce of the nature described above (Order as to R.C.A., R. 413, 414 (see (e) and (j)); Order as to Frigidaire, R. 419, 420 (see (5))).

Similarly, in its Motions(s) For Production of Documents addressed to the defendant factories (R. 422, 425), and defendant distributors (R. 434, 437) in June, 1964, appellants sought production of:

"15. All intra-office reports, memoranda or notes pertaining or relating to the plaintiffs above named or the retail de-



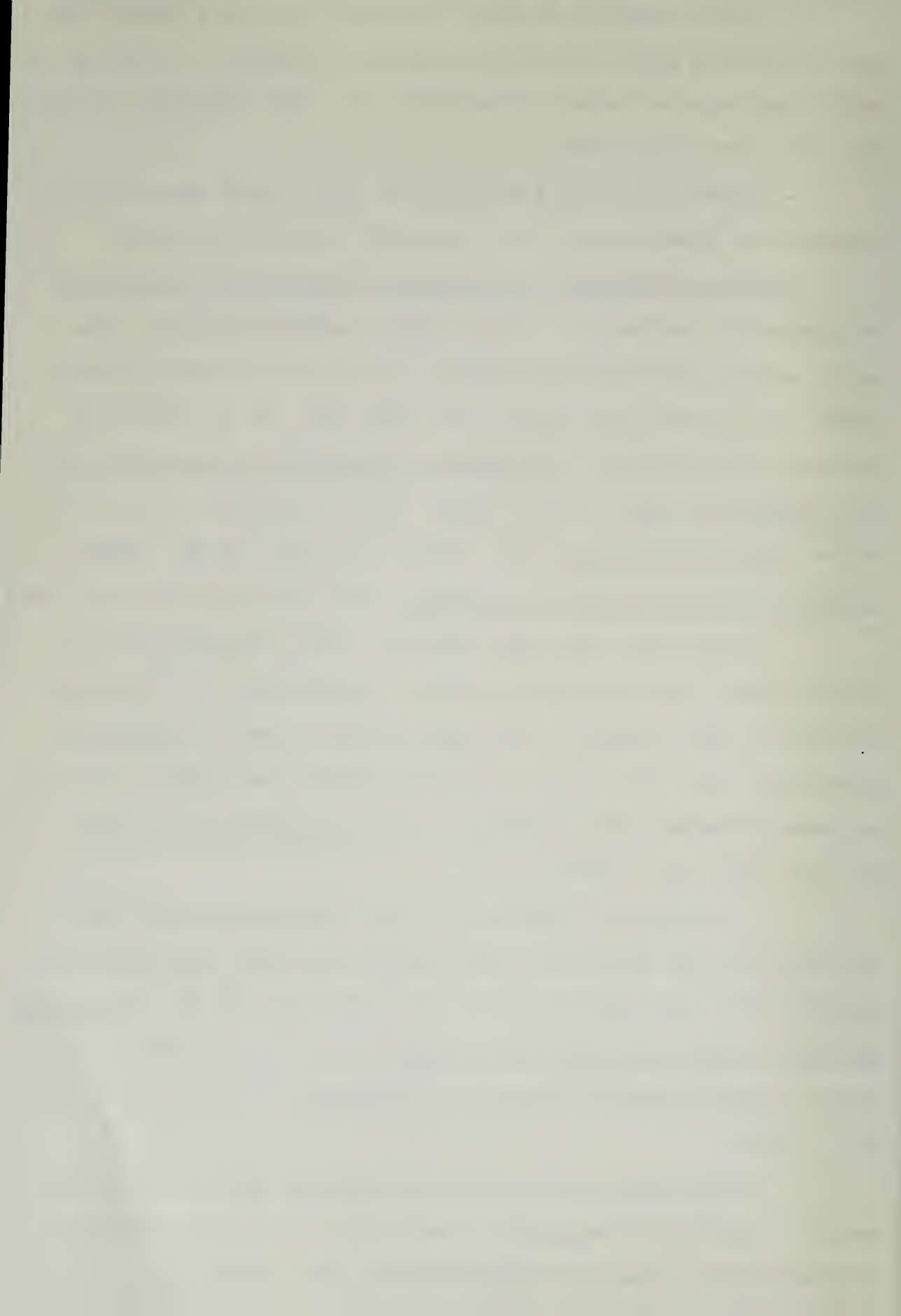
After hearing on these motions, the Court denied the portion quoted above (Pre-Trial Hearing of August 7, 1964; P. Tr. 88-90) and entered orders accordingly (R. 598, 607-608, 615-616, 680, 673, 786, 618, 789).

Under F.R.C.P. Rules 45 and 26(b), such documentary evidence is discoverable if it contains information which ". . . appears reasonably calculated to lead to the discovery of admissible evidence." (Rule 26(b); emphasis added.) The party seeking documentary evidence of this nature may proceed either by a motion for production (Rule 34), or (as here) by subpoena (Rule 45(d)). Alexander's Department Stores, Inc. vs. E. J. Korvette, Inc., 198 F. Supp. 28, 29 (S.D.N.Y. 1961); 4 Moore, Federal Practice, para. 26.10, p. 1053 (2d Ed. 1966); Olympic Refining Company vs. Carter, 332 F.2d 260 (9th Cir. 1964)

That there was good cause for full discovery of all intra-company documents pertaining to appellants, or the retail defendants, was clearly and unequivocally shown by appellants' pleadings, the trial record, and the hedging and dodging of the witnesses demonstrated therein. Cf., Schlagenhauf vs. Holder, 379 U.S. 104, 119 (1964).

The subpoena addressed to Mr. Gentile and Mr. Shaw should have been enforced, since these employees were managing agents within the meaning of F.R.C.P. Rule 26 and 43. Gibbs vs. RCA Victor Distributing Corporation, 214 F. Supp. 52 (W. D. Mo., 1963); Newark Insurance Company vs. Sartain, 20 F.R.D. 583 (N.D. Cal., 1957).

Appellants were prejudiced because definitive orders were not granted allowing the production of all intra-office correspondence regarding their requests for product.



B. Appellees And Co-Conspirators Should Have Been Required To Admit The Existence Of Any Statements Or Reports Reflecting Conversations Between Their Representatives And Anyone Else, Concerning Appellants' Purchase, Sale Or Advertising Of The Products, Or By The Retail Defendants And Co-Conspirators:

In its written Interrogatories to All Defendants, filed September 29, 1964 (R. 625), appellants asked:

"INTERROGATORY NO. 2: State whether or not there exists . . . written statements or reports reflecting any conversations between an employee, officer, agent, or representative of your company . . . and any other person having to do, in whole or in part, with the acquisition, sale or advertising of television sets or major household appliances by the plaintiffs . . . or the retail defendants . . . ." (Emphasis added)

Interrogatories Nos. 3, 4, 5 and 6 asked for the dates, locations and custodians of such documents, and whether or not they were claimed to be privileged (R. 626).

After hearing, the Court ruled that these interrogatories did not have to be answered (Pre-Trial Hearing of October 16, 1964, at P. Tr. 6-10) after defendants objected to them, and entered its order accordingly (R. 671).

Pursuant to F.R.C.P. 33, interrogatories to adverse parties may ". . . relate to any matters which can be inquired into under Rule 26(b) . . . ."

Appellants were entitled to have identified and to inspect the same type of memoranda they earlier had to produce for defendants under the Order of Judge Weigel which was clear and broad (R. 270) (produce ". . . all notes, documents, papers . . . made by plaintiffs or officers, employees, agents or persons





acting on behalf of plaintiffs, of any conversation wherein one party to the same was an employee of any one of the defendants or alleged co-conspirators . . .")

It is respectfully urged that appellants are entitled to lay a foundation as to the existence of witness statements and reports. D.I. Chadbourne vs. Superior Court, 60 C.2d 723 (1964); United States vs. Aluminum Co. of America, 1961 Trade Cases, para. 69,910.

C. The Factory Defendants Should Have Been Required To Produce Litigation Statements, All Correspondence Received From Distributor Defendants, And From Appellants (Relating To The Matters In Issue) And Correspondence Which Reflected Discussions At Trade Associations Meetings About Discount Stores:

Appellants moved for the production of any documents held by the factory defendants, of the general nature summarized above, by its motion filed November 20, 1964. (R. 745; see Item 20 (R. 749), Items 22(c), (d) and (e) (R. 750), and Item 27(f) (R. 751-752).)

After hearings, the Court denied production of the documents called for under the parts of the motion specified above. (See Pre-Trial Hearing of December 30, 1964, P.Tr. 109-113; 115-119; 124-127; 174-182; Pre-Trial Hearing of December 31, 1964, P.Tr. 234-237; 247-248; 256; R.129, 978, 982-983, 1008, 1019, 1057, 1063).

Correspondence between the factories and their distributors as precisely limited and defined in the motion could only reasonably lead to the discovery of relevant evidence since the description of them was relevant by definition.



Correspondence produced under Item 27(f) could either indicate (or lead to the discovery of such) evidence that the factory representatives discussed discount stores during trade association meetings, so indicating their awareness of this new merchandising phenomenon, and more importantly, their concern about its price-cutting and price de-stabilizing impact. Such evidence would provide the motivational cement to show that the circumstantial evidence of common refusal to deals was part of an overall design to assist key retailers in boycotting the new discount store operations.

For the reasons stated above, appellees G.E., R.C.A., Maytag and Whirlpool should have been required to answer Interrogatories Nos. 1, 2, 3, and 6 of Plaintiffs' Second Interrogatories Directed To All Defendants, filed December 7, 1964 (R. 790, 791-792). After hearing, the Court sustained appellees' objection to identifying statements or reports. (Pre-Trial Hearing of December 30, 1964; P.Tr. 197-200; 203-205; R. 972, 969-970, 986, 1021, 121). Such interrogatory sought production of any litigation statements or reports reflecting discussions about appellants, whether the result of attorney interviews or not, for the period of January 1, 1957 to and including August 4, 1964 (when the second complaint was filed); thus comprising a final, unsuccessful attempt to obtain such witness statements.

Clearly, appellants were prejudiced in having to face hostile and adverse witnesses who may have made statements concerning conversations with appellants or about appellants, as they were unable to discover the existence of such statements,



or whether they were or were not protected by the rule in Hickman vs. Taylor, 329 U.S. 385 (1947).

XX

CERTAIN ITEMS OF COSTS WERE IMPROPERLY  
TAXED AGAINST APPELLANTS  
(Specification of Errors IX)

The Court improperly taxed certain items of costs claimed by the appellees (see, generally, Tr. 6919-7029):

1. Cost of two copies of daily trial transcript:

Appellees ordered five copies of the transcript to be shared between the ten defendants (R. 2039). The Court taxes the costs of two sets. (See Hearing on Costs, November 30, 1965, Tr. 6920-6921).

2. The Court taxed the costs for one copy of every deposition taken by appellants, and by appellees. (See, for instance, Tr. 6931, 6942-6945, 6959, 6988, 7006, 7027).

3. The Court taxed the costs for copies of the transcripts of various pre-trial hearings. (See Tr. 6920, passim).

4. The Court taxed costs for reproduction of one copy of all appellants' exhibits, which were lodged in the courtroom before and during trial. (See, for instance, Tr. 6924, 7008).

5. The Court taxed as costs the travel expenses of Mr. Saxon, an officer of R.C.A., incurred by his trip from Las Vegas, Nevada to San Francisco for his deposition (Tr. 6979-6985).

Total costs taxed amounted to \$22,088.69 (R. 1979).

The basic policy for District Court discretionary power in taxing costs, was clearly expounded by the Supreme Court in Farmer vs. Arabian American Oil Co., 379 U.S. 227 (1964), where it said, concerning F.R.C.P. Rule 54(d), at p. 235:





" . . . We do not read that Rule as giving District Judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claim to be. Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute. Such a restrained administration of the Rule is in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation." (Emphasis added.)

The decision in Farmer re-established the ruling of the trial court disallowing costs of daily transcripts as "convenience of counsel" was not sufficient. 31 F.R.D. 191, 196 (S.D.N.Y. 1962). The appellees cited Independent Iron Works, Inc. vs United States Steel Corp., 322 F.2d 656, 676-679 (9th Cir. 1963) in support of taxing such costs (Tr. 6935-6940). Independent Iron Works, Inc., relies extensively on Judge Hinck's opinion in Perlman vs. Feldman, 116 F. Supp. 102 (D.C. Conn. 1953), where the court taxed costs for only one copy for all defendants, and that on a showing that the transcript was often used during trial in "conducting their examinations" of witnesses. (116 F.Supp. 102, at 106). Here, there was no such utilization, nor was there a demonstrable need by appellees for more than one copy; certainly not for two. In the face of the policy expressed in Farmer, charging losing litigant with the costs of conveniences the prevailing parties have "seen fit to incur", is not proper. See Kenyon vs. Automatic



Investment Co., 10 F.R.D. 248 (W.D. Mich. 1950); Braun vs. Hassenstein Steel Co., 23 F.R.D. 163, 165-168 (D.S.D. 1959); and Consolidated Fisheries vs. Fairbanks, Morse & Co., 106 F. Supp. 714 (E.D. Pa. 1952).

Costs of copies of depositions taken by plaintiffs are ordinarily not taxable in favor of prevailing defendants. Jerome vs. Twentieth Century Fox Film Corp., 71 F. Supp. 916 (S.D.N.Y. 1946). Even in the exercise of its discretion, the court should only tax as costs the copies of such depositions shown to have been put to use at trial, as distinguished from convenience in preparing for trial. Hancock vs. Albee, 11 F.R.D. 139 (D. Conn. 1951), followed in Independent Iron Works, Inc., supra; see Gillam vs. A. Shyman, Inc., 31 F.R.D. 271, 274 (D. Alaska 1962); Curaco Trading Co. vs. Federal Ins. Co., 3 F.R.D. 261 (S.D.N.Y. 1942), affv'ed 137 F.2d 911 (2nd Cir. 1943). However, even if the court further seeks to tax costs of copies of such depositions, it should not extend its ruling to those of representatives of co-conspirators, who were not parties to the trial. See Perlman vs. Feldman, supra, at 110. Thus, only the depositions listed on page 5 of appellants' Objections To Defendants Bills of Costs (R. 2042, 2046) should be subject to taxable costs. Copies of all depositions taken by appellants were not "necessarily obtained" for use at trial (see 28 U.S.C. §1920(2)); therefore under the policy expressed in Farmer, it was improper for the Court to tax costs upon all such copies ordered by appellees, as it did.

In the face of the general rule that copies of depositions taken by the prevailing parties, and not used at trial,



are not taxable (Burnham Chemical Co. vs. Borax Consolidated, Ltd., 7 F.R.D. 341 (S.D. Cal 1947)), the court nonetheless taxed the costs of one copy of depositions taken by defendants. Copies of depositions taken merely for investigation, or pre-trial preparation, are not properly taxable. Bank of America vs. Loew's International Corporation, 163 F. Supp. 924, 930-931 (S.D.N.Y. 1958); Perlman vs. Feldman, supra. Appellees used such depositions at trial only in argument upon the introduction of the Alpine deposition - it was not used in trial - and in one limited instance each for the impeachment of Mr. Boyd and of Mr. Freeman. Such limited use should not authorize granting appellees costs for all copies of the depositions they took; the rest of which were in no way utilized at trial (for impeachment or otherwise).

Having copies of appellants' exhibits, which were lodged in Court from a time prior to trial, may be a convenience to appellees, but the incurring of such costs does not meet the test of 28 U.S.C. §1920(4) that such be "necessarily obtained." Instead, this item of pure convenience falls squarely within the proscription stated so clearly by the Supreme Court in Farmer: There was no showing by appellees that it was necessary to have copies of all such exhibits in the offices of counsel. For such failure, the allowing of these costs was also improper. See Perlman vs. Feldman, supra, at pages 112-113.

Taxing the costs of copies of pre-trial hearings also falls within an abuse of discretion, even prior to the policy stated in the Farmer case. As stated by Judge Hincks in Perlman vs. Feldman, in disallowing similar costs (116 F. Supp. 102 at 11





" . . . None of these hearings involved the taking of evidence; the transcripts, which were furnished by the official court reporter, include only argument of counsel and colloquy with the court . . . No showing has been made of any necessity for these transcripts. It appears to me that the ensuing memorandum of decision or order of the court served every need . . . To tax such items would be to encourage a need-less addition to the costs of litigation which as applied to subsequent cases might well reach disproportionate dimensions." (Emphasis added.)

Allowing R.C.A. to recover the travel expenses of its witness to come to San Francisco for a deposition transgresses the holding in Farmer, as well as prior rulings in this Circuit. In Farmer, it was observed that as under Rule 45(e), a subpoena cannot be served outside the district, more than 100 miles from the place of trial:

" . . . (M)any decisions of the district courts and courts of appeal have held that since witnesses cannot be compelled under this rule to travel more than 100 miles, a party who persuades them to do so by paying their transportation cannot have these expenses taxed as costs against his adversary." (379 U.S. 227 at 231).

As Justice Goldberg noted in his concurring opinion in Farmer (379 U.S. 231, at 239), the prevailing rule in this Circuit is that mileage allowable should be that which was traveled within the district, or actual mileage traveled in and out of the district up to 100 miles, whichever is the greater. Kemart Corp. vs. Printing Arts Research Laboratories, Inc., 323 F.2d 897, 904 (9th Cir. 1956). R.C.A. sought, and recovered as costs, total expenses of \$125.83, for voluntarily bringing Saxon from Las Vegas to San Francisco (including lodging and meals). (R. 1999.) It was clearly against established law to have allowed such claims as taxable costs.



CONCLUSION

For the reasons given herein, the judgment of the Court should be reversed as to all appellees, costs reduced, and this case remanded to the District Court for further trial.

DATED: The \_\_\_\_\_ day of October, 1967, at San Francisco California.

Respectfully submitted,

MAXWELL KEITH  
EDWIN C. SHIVER

By \_\_\_\_\_  
MAXWELL KEITH  
Attorneys for Appellants.

FELDMAN, WALDMAN & KLINE  
Of Counsel

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

\_\_\_\_\_  
MAXWELL KEITH  
Attorney for Appellants.









J. S. Sayre

MR. R. H. QUAYLE  
W. C. FISHER  
H. P. BULL

July 15, 1960

*Memorandum*



Gentlemen:

Attached is a copy of a memorandum which was handed out at yesterday's NEMA meeting for consideration by the appliance manufacturers.

I will discuss this with you in our Monday morning meeting.

Sincerely yours,

ORIGINAL  
J. S. SAYRE

JES  
ds

~~EXHIBIT NO. 1~~

APPENDIX B



# EXECUTIVE MANAGEMENT RESPONSIBILITIES

## IN MARKETING PRACTICES

The major appliance industry has not been considered as a "growth industry" since the middle '50's. This is quite a transition from the enviable position held by the appliance industry for the previous 20 years.

Up through 1950, there was a premium on appliance sales and management talent in other industrial fields. The situation no longer exists, as our industry, second only to automobiles and the durable goods field, has converted from a highly specialized sales group--utilizing merchandising practices that are a credit to American business down to a straight competitive price retailing operation, with little or no salesmanship and very little opportunity for profit at the manufacturer, distributor or dealer levels. This is quite a transition for such a short time. The attached chart reflects the magnitude of this downdraft.

The following analysis covers the contributing factors and the remedial action that can be taken:

1. Probably the prime reason for our present status is the intense competition in trying to "cutbid" each other to compensate for productive capacity well in excess of current market. Unfortunately, these tactics do not sell one more appliance.

The primary contributing factor to the present marketing situation is the manufacturer's approach to:

- a. Large volume retailers.
  - b. Apartment house-builder volume.
  - c. Trailers.
2. An area of opportunity to take corrective measures could be activated if manufacturers would follow the following simple rules applied to their distribution pattern with exclusion of government housing:
    - a. Establish distributor prices and dealer prices to be used with all retailers regardless of type or volume, and in no instances waiver from these established prices (This recommendation is only living up to the law of the land and conforming to Robinson-Petman and the Clayton Act.)
    - b. No quotations to any type of distribution (excluding government housing) at less than distributor or quantity dealer prices, whichever is preferred.
    - c. All co-op advertising and supplemental advertising funds not to exceed 50% of national rate to be used for "bona fide" advertising, without exception. This would completely eliminate some the pseudo practices where advertising funds are made available for window rental, purchase space, display space, and other practices that result in downward price adjustment rather than advertising.
    - d. Promotion fund not to exceed 1% of maximum dealer billings, and in all instances to be spent only with the dealer creating a fund, without deviation. If the dealer does not utilize the fund, then the balance will revert back to the factory.



If consideration could be given to these recommendations, then the application depends entirely on competence, integrity and complete belief in each other as to the administration of the program.

It is assumed that the pricing programs on each individual manufacturer's product are competitive, giving consideration to product differences and features, and, of course, it would be incumbent to bring them in line with competition before this recommendation would become practical.

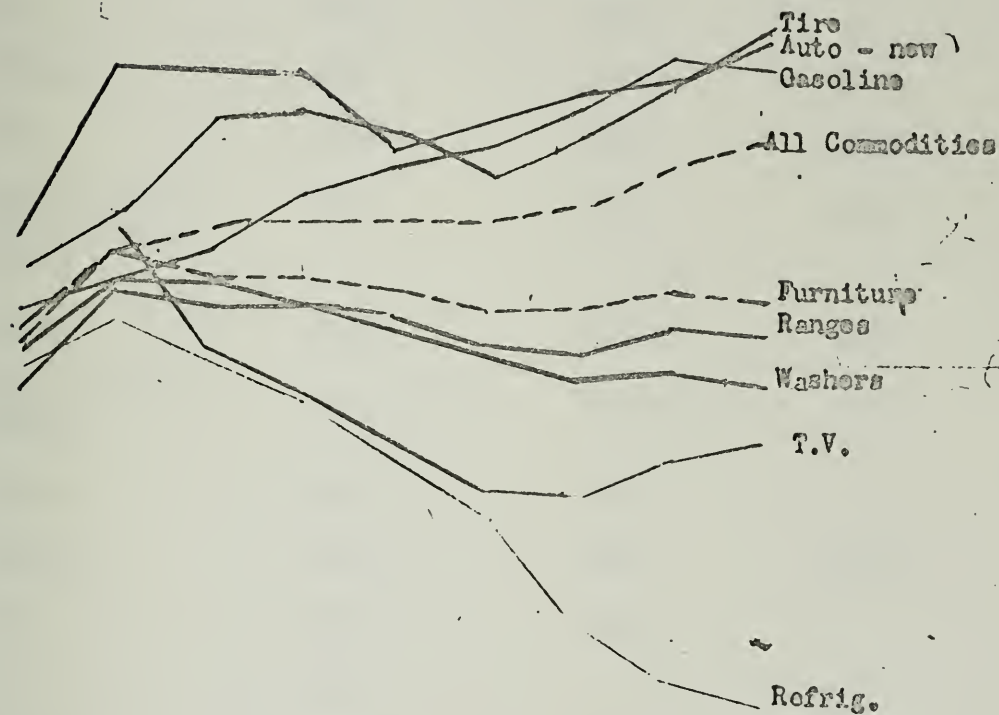




CONSUMER PRICE INDEX

YEARLY TREND

1947-1949 = 100 PERCENT



50 51 52 53 54 55 56 57 58

Nat. Ind. Conf. Bd.  
U.S. Dept of Labor  
Bureau of Labor Statistics



# APPENDIX C

## TABLE OF EXHIBITS

### APPELLANTS' EXHIBITS

<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
1	4499			
2	2656; 3486	2656; 3486	3486	2656
7	6478	6478		6479
13	3059	3059	3060	
14	5185	5187		5187
26-A; B	3809	3810	3811	
28	3099	3099	3099	
31A-C; 32A-C; 33A-B; 33C; 34A-B	3047	3047	3047	
35; 36	4208	4208	4208	
46A-B; 47A-B; 48A-B	2392; 2712	2392; 2712	2712	2393
49; 51	2677	2677		2679
50A-G	2793	2793	2793	
52	2396	2399		2399
53	2671			
54-59 (except 58)	3626	3627	3628	
62A-F	3853	3854	3854; 3858	
63	3856		3858	
64	3831	3831; 3861		3862
65; 66A-B	3857		3858	
68; 69; 85	3837	3841		3841
70-72; 75; 77-79	3751	3751	3753	

THE HISTORY OF THE

REIGN OF

Year	Month	Day	Event	Page
1701	Jan	1	James II. King of Great Britain, died.	1
1701	Jan	2	James II. King of Great Britain, died.	2
1701	Jan	3	James II. King of Great Britain, died.	3
1701	Jan	4	James II. King of Great Britain, died.	4
1701	Jan	5	James II. King of Great Britain, died.	5
1701	Jan	6	James II. King of Great Britain, died.	6
1701	Jan	7	James II. King of Great Britain, died.	7
1701	Jan	8	James II. King of Great Britain, died.	8
1701	Jan	9	James II. King of Great Britain, died.	9
1701	Jan	10	James II. King of Great Britain, died.	10
1701	Jan	11	James II. King of Great Britain, died.	11
1701	Jan	12	James II. King of Great Britain, died.	12
1701	Jan	13	James II. King of Great Britain, died.	13
1701	Jan	14	James II. King of Great Britain, died.	14
1701	Jan	15	James II. King of Great Britain, died.	15
1701	Jan	16	James II. King of Great Britain, died.	16
1701	Jan	17	James II. King of Great Britain, died.	17
1701	Jan	18	James II. King of Great Britain, died.	18
1701	Jan	19	James II. King of Great Britain, died.	19
1701	Jan	20	James II. King of Great Britain, died.	20
1701	Jan	21	James II. King of Great Britain, died.	21
1701	Jan	22	James II. King of Great Britain, died.	22
1701	Jan	23	James II. King of Great Britain, died.	23
1701	Jan	24	James II. King of Great Britain, died.	24
1701	Jan	25	James II. King of Great Britain, died.	25
1701	Jan	26	James II. King of Great Britain, died.	26
1701	Jan	27	James II. King of Great Britain, died.	27
1701	Jan	28	James II. King of Great Britain, died.	28
1701	Jan	29	James II. King of Great Britain, died.	29
1701	Jan	30	James II. King of Great Britain, died.	30
1701	Jan	31	James II. King of Great Britain, died.	31

<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
73	3826	3826	3827	
88;90;91	1194	1194	1196	
92	1211	1213	1214	
93	1258	1258	1259;4656	
94A-G	4652		4656	
97A-B	4807	4808		4808
99	1234;4562	1237;4563	4563	1237
101-103	1196	1196	1197	
106A-D	2861	2861		2861
134	3308	3308	3308	
148				
149	5281	5281	5283	
156A-E;155A-E; 154A-E;153A-F; 152A-H;150A-G	5274	5274		5275
157-159	6146-A	6146-A	6147	
160B	4219	4220	4220	
160D;F;G	4219	4221	4221	
160E	4590	4590	4590	
161A-AF	5047	5048	5048	
163	3298	3297		3300
168-173	2801	2804	2804	
174-183	3852	3852	3853	
196-199	2416	2418	2418	
204	1454;4047	4048	4048	
209	1458	1458		1459
210-226 (except 212; 222)	1694	1694	1697	





<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
212	4297	1736;2235; 4297	2236;4299	1736
220	1693	1694		1697
227-1-4	1692	1692	1693	
234	4263	4264		4264
256	4301	4301	4301	
272-276	1672	1673	1674	
294	2381;2585	2382;2585	2586	2382
295-299	1038	1072	1072	
300-300A	1406	1406	1407	
301	1407	1407	1407	
307A	3615	3615		3615
310	1248;4500	1250;4924		1251;492
311	4936			
313-316	1107	1108	1108	
318-321	1706	1710	1711	
322	3366	3367	3367	
325A-B	2347	2347	2348	
327-333	6519	6519	6520;6842	
334	868	871	871	
337	708	714	714	
338	784	785	787	
339	1480;3086; 6089	3093;6093	6093	3113
339A-B	3100	6093	6094	
340	1481;6088	6093	6094	
342	664	664	664	
343	4549	4549;4570; 6496	6508	4550;457



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
344	4549	4718;6496	6508	4718
345	1985	1985;1991		1992
346	1802;1834	1806;1835		1806;18
348	3167;4600	3167;4603	3167	4604;46
349	268	4650	4651	
350	268	276;4650	4651	277
352	6155;6483			6485
359	4942	4942		4942
363		4747		4747
364	4497	4498;4747		4498;47
365	4498	4498;4747		4498;47
378A-B				6599
384	377;1597	382;1598		383;15
390	386	386		386
391	1523	1756		1757
392A;393A; 394A-B				6599
395;395A 400	414 1633;2342	415 2342;2345		416 2343;23
402	1634			2345
403	1157;1247	1157;1247; 1313;4935		1157;12 1313;49
404	1636;5695	5695	5698	
407A-B	2282	2283		2283
408A	2288	2289		2289
420	2611	2612		2612
422	935	936;4277	936	4277
423-424;426	935	936	936	
428E	940;3128	940	941	



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
429	936	936;963	936;964	968
430	1936	1937	1938	
430A				
431	3029	3029;6468	3029	6469;68
434;435; 444; 445;448	340	350	350	
450A-B; 451A-B	345-346	348	350	
453	380	382		382
454	1847	1847		1848
454A	1570	1864		1865
455	1717	1736;2235	2235	1736
463	1722	1722	1722	
465	4121	4122	4122	
466	1623	1623		1623
468	1620	1620	1621	
475	3784	3785	3785	
476;478	3796;3797	3795		
479	6152	6152;6483		6159
480	6153	6154		6154
481	6147	6148;6483		6148;64
482A;D	3184	3192	3192	
483	3773	3775	3775	
487	4230	4230	4230	
491	4024	4026	4026	
492A;493A; 494A	4223	4225	4226	
496A	4238	4238	4239	





<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
497	4235	4235	4235	
504	5191	5191	5190-A	
504B		5836		5836
509	5237	5237	5238	
510	4331; 4348	4332	4332	
511; 513	5239	5239	5239	
512	4332	4332	4333	
514	4161	4162; 4168	4163; 4168	
515-520	4165	4166	4168	
521-522	4166	4166	4166; 4168	
523; 524A; 541A	5955; 5956	5956	5957	
525	3069	3069	3069	
526	5547; 5575	5575	5575	
527A; 528A	5458	5458	5458	
528	3206	3207		3207
529	990; 5471	5472		5473
530	5464; 5519	5465; 5520	5520	5469
536A	3074	3077	3077	
536C	3072	3073	3073	
537	5457	5457	5457	
538	4478	4477	4478	
542	5794	5794		5795
544; 536	3080	3080		3082
547A	4452	4452	4454	
548A	4452	4452		4454
551	2379; 2582	2379; 2584	2586	2380; 25



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
553	2587; 2606	2588; 2609; 5813	5814	2588; 26
556	2616	2618	2618	
565	3342	3342		3343
567	3329	3329	3330	
568	5790		5791	
574-575	1303	1305	1306	
592	589	590		590
603	5003	5003		5004
627-630	3355	3354; 3364		3355; 33
631-636	4254	4254		4256
637	2438; 3983	3983	3983	
638	1461	1484	1484	
639-640	179; 1114	179; 189; 1114	1114	190
641	1101	1118	1118	
643	2374; 2689	2376; 2689	3028	2376; 26
644	1024; 2596; 2758	1026; 2596; 2736; 2758	2758	1027; 25 2737
645	2374; 2689	2376; 2689		2376; 26
646A-B; 647; 648	3822	3822	3823	
654A; 656A-C	3709	3709	3710	
655A-C	3708	3708	3709	
665	282; 1494	282; 1495	1498	282
667	289	288	288	
668				
676	5110	5110	5114	
680-681	5101	5103	5104	



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
684	5062	5063		
685A-C	1264	1265	1266	
686A-E	1277	1277	1278	
687A-C; 688	5092	5092	5094	
689A-B	1271	1270	1271	
690	6142	6142	6142	
691	6143	6143	6143	
697-699	780	779	780	
698C	1259	1260	1261	
708	739	739	739	
712-713; 715	802	802	802	
714; 717	737	738	738	
719-721; 727; 723-724; 729	1374	1375	1375	
730; 769-770	1127	1128	1130	
731-736 (except 733)	868	871	871	
737	6515; 6842			6842
739-740	1365	1365	1366	
772-773	1117	1117	1117	
780	4649	4649		4650
781	777	777	777	
783-784	4417			4417
787	1020; 4501	1022; 4927		1023; 4501 4928
788; 790	4502	4502		4503
789	4502	4502; 4930		4503; 4930
791	1205	1206		1207





<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
792	3800	3800	3801	
794-796	1136	1136	1137	
798-802	1142	1142	1143	
866A-B	1092	1092	1092	
921;928;933; 934	754	755	755	
937	763	764	765	
1034-1035	1489	1489	1489	
1059B	1491	1489	1489	
1061-1062	1489	1489	1489	
1072-1073;1079; 1080;1089	1120	1121		
1081	1492	1489	1489	
1094-1107	1467	1469	1070-71	
1159	4649	4649		4650
1161	605	605	606	
1165	4952	4953		4953
1167;1169	4955	4956		4957
1168	4957	4958		4959
1184	5332;6520	5332		5333;65
1192-1194	839	843	843	
1207	1793	1792	1793	
1213	1790	1790	1791	
1215	1786			
1219;1226	3355	3355;3364		3355;33
1230A	1832	1830	1830	
1261-1262	3355	3354;3364		3355;33
1271A-B	2088	2091	2091	



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
1272	2080	2082	2082	
1273A;1274A	2077	2078	2078	
1275A	2073	2076	2079	
1277A;1278A	2084	2085	2086	
1297	4466	4469		
1360;1362	1825	1826	1826	
1365-1366	4940	4940		4941
1369	3824	3824	3824	
1484-1486	3770	3767	3769	
1488	6305	6305		6309
1489	6302	6305		6305
1490	6310	6323		6324
1491	6362	6362		6362
1500-1	6363	6363		6363
1523	3291;5741	5745	5746	
1524	453	454;484	454;486	
1525	192;453	194;454; 473;483	454;473; 484	195
1560				
1561-1578	6365	6382		6401
1579-1681	6401	6402		6402
1691	6115	6122		6116
1692-1693;1695	4977	4977	4978	
1684;1697; 1698;1701	5957	5957	5958	
1703	1220;5972	1220;1245; 4969;5599; 5972	1220;5973	1225;124 4969;560
1704	5972	4969;5972	5973	4969



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
1705	1290; 5972	1291; 4996; 5972	1291; 5973	1292; 49
1706	5972	5972	5973	
1707-1708	4911	4912	4912	
1709	5961			
1710-1711; 1715; 1716; 1718	5144; 5150	5144	5145	
1714	5144	5144; 5146		5147; 51
1721	5144; 5154	5144; 5944	5157; 5944	5145
1722	5144; 5154	5144; 5944	5944	5145
1740	3826	3826	3827	
1745				
1750	1614	1615; 1629		1615; 16
1754; 1756	2394; 5976	2395; 5821 5976	5977	2396; 58
1757; 1758	5976	5976	5977	
1759-1760	2851; 5977	2853; 5823; 5977		2853; 58 5978
1761-1762	5823; 5977	5823; 5977		5823; 59
1763	5962	5968	5969	
1769	3004	3004		3005
1771	3004	3004; 5818	5818	3005
1772	3001	3001; 5395	5396	3002
1773; 1775	2621; 5950	2621; 5950		2623
1774; 1840; 1702	5969	5970		5970
1783	3696	3696	3696	
1784A-B	3742	3742	3742	
1785	3850	3850	3850	





<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
1788	3615;3723	3615;3727; 3737		3615;37 3737
1789	3563			3570
1790	1082	1084	1084	
1801;1803- 1804	5975	5975	5976	
1808	5627;5915	5915	5916	
1815-1817	5978	5978;6176		5979;61
1818-1819	5965	5968	5968	
1827-1;2	3945	3945		3946
1827-16	5729	5729	5729	
1827-17	5730	5730	5730	
1828-1829	4030	4031	4036	
1842-1846	6840		6508;6841	
1846	4598	4598;4964; 4997		4599;49 4997
1847-1898	1086	1087	1087	
1899	3606;3848	3606;3848	3849	3606
1901	876	876	878	
1903-1908	792	796	796	
1909-1912; 1913	817	817	818	
1917	4472	4473		4473
1918	3212	6538	6539	
1919	6533	6533		6534
1920	874;3471	874;3472	3472	875
1921	873	873	874	
1922	2401;2659	2401;2660		2401;266
1923	2659	2660		2661

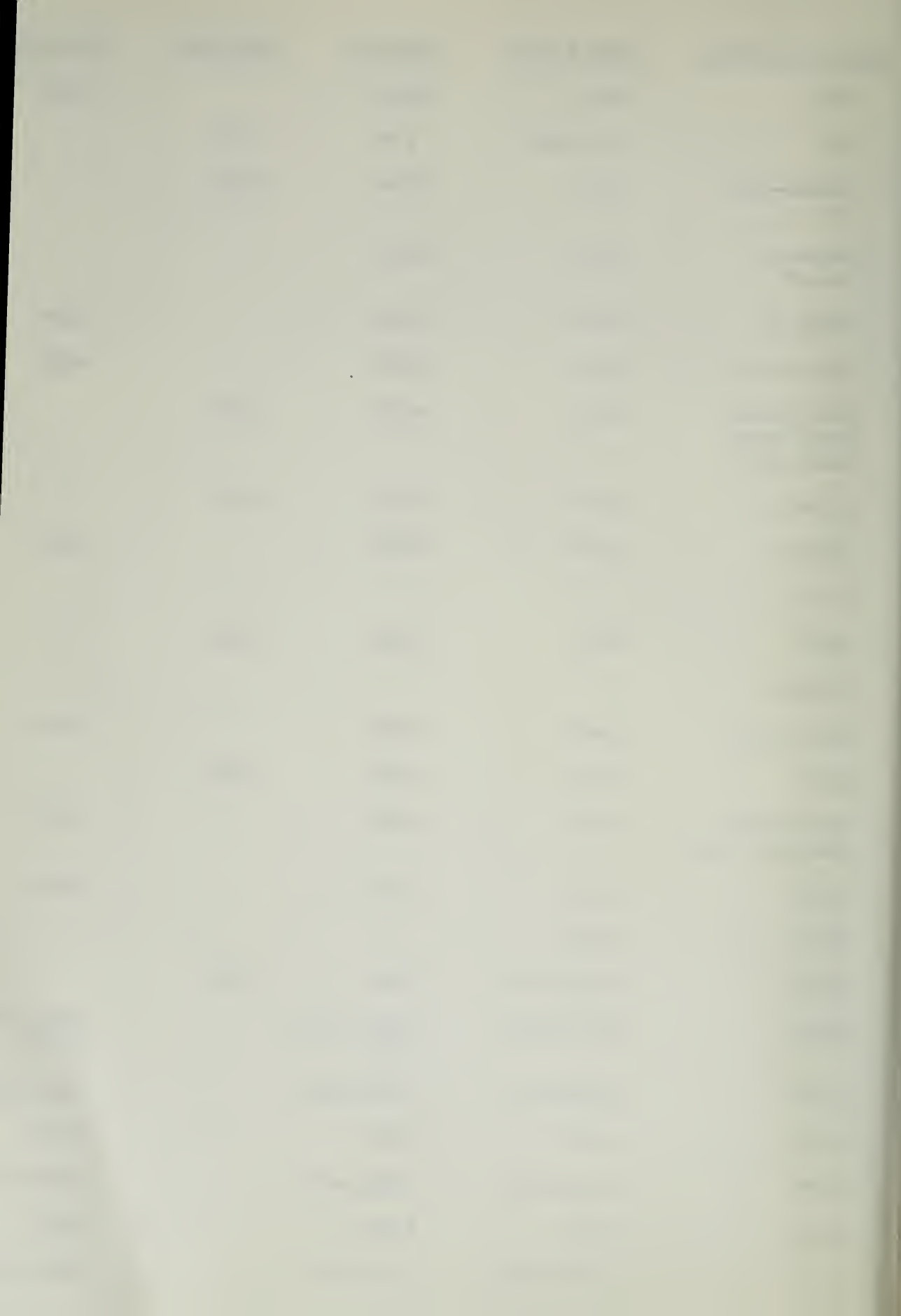


<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
1924	2666;2681	2669;2681; 2833;3018	6842	2669;26 2833;30 3113
1926-1931	863	863	865	
1933-1935	5022	5023;5142	5143;6411	5023
1933DF	5024	5143	5143	
1935Q-R	5130	5130	5132	
1936A-D	631	632	634	
1937	817	817	818	
1938	6539	6539	6540;6853	
1939-1942	2856	2857		2857
1941	2855;6562	2856;6563		2856;65
1943-1944	3842	3842	3844	
1945	3611	3611		3612
1945B	3615	3615		3616
1946	863	863	865	
1947	1229	1229	1229	
1948A-AV	688	689	692	
1950	741	741	743	
1952	743	743;753	753	
1953-1954	725	726	727	
1955	823	823	824	
1956A-AF	596;610	615	615	
1956J	596	599	599	
1957 (except DC-DE)	819	819	822	
1958	847	847	848	
1959	849	849;860	850;860	



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
1960	6583	6586		6587
1963	212;634	638	638	
1964AZ-BF; A-V	1723	1728	1730	
1964W-Z; AA-AY	6535	6535		
1985A-B	4256	4258		4259
1986-1999	4260	4260		4260
2058;2060; 2061-2064; 2068;2070	4005	4008	4010	
2059A-B	4017	4017	4017	
2069A-B	4018	4021		4022
2074				
2081	3997	3998	3998	
2090A-G				
2092-2099	6469	6469		6472
3005	1213	1213	1214	
3000-3008 (except 3005)	6469	6469		6472
3009	3510	3509		3510
3010	3036			
3022	3039;6475	6475	6843	
3024	3511;6475	3511;3521; 6475		3511;3521; 6477
3026	3508;6475	3508;6475		3509;6477
3028	6475	6475		6477
3029	3520;6475	3520;6475		3520;6477
3030	6475	6475		6477
3032	3514;6475	3518;6475		3519;6477





<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
3036-3037	6475	6475		6477
3041-3044	6135;6483	6135;6480		6483
3049	5824	5825;5978		5825;597
3051-3052	866	866	866	
3054	656	659	661	
3071	5551	5585;5592		5592
3076	2790	2791		
3082	404	406		406
3085	529	530		530
3086	525	528;678		528;678
3095	3019	3019		3113
4010	2730;2981	2732;2980	2982	2732;299
4011;4014	2976;2978	2977	2978	
4019	2993	2993	2993	
4023	2732;2980; 2986	2732;2980	2982	2732;548
4028	2972			
4029	2716	2716	2716	
4034-4037	2996	2996	2996	
4038	5817	3004;5817	5818	3005
4041-4042; 4046-4052	2561	2561		2562
4053	2865	2865		
4054	1371	1372		1374
4055	2940	2941;2958	2958	2943
4056-4057	2965	2965		2966
4058	2633;2793	2792	2793	
4059	2634;2799	2799	2799	



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
4079-4080	2629	2630		2630
4082-4083	2624			
4084A-C	2785	2789		2789
4085	2860	2861		2861
4089	2702	2703	2704	
4092A-C	2698	2699		2700
4096B	2964	2965	2965	
4098B-1; G-1;H-1-H2	2737;2748; 2751;2755	2746	2746	
4098X-Y	2737	2738		2738
4099A-B	2759;2762	2760	2768	
4099C-G	2767	2767	2768	
4101	2770	2770	2770	
4102	2774	2777	2778	
4108	2626			
4112	2839	2840		2840
4113	2841	2841		2845
4119	6592	2863;6592	6595	2863
4120A-AK	2864	2865		2865
4127	5231	5231	5231	
4128	4138	4138	4138	
4129A-F	2011	2011	2011	
4130A-D	1998	1999	1999	
4131-4135	5249;5250	5249	5250	
4140	4334			
4141A-B	5276	5276		5277
4142	450	450;3897		450;3899



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
4146	2826	2827		2828
4150	6483	6483		
4153	1119	1119	1119	
4154	6494	6495		6495
4161	1118	1118	1119	
4164A-F	3346	3346	3347	
4165	3352	3353	3353	
4170	1555;1910	1558;1910		1559;19
4176				
4178	2266	2267		2268
4178A-C	4100	4103		4104
4179;4287; 4178	6530			
4188D	3152	3152	3153	
4189	3156	3156	3157	
4196	6513	6513		6513
4201	5962	5968	5969	
4207A-B	6138	6138	6139	
4218	6137	6138	6139	
4224A-F	5048	5048	5048	
4227	5030	5030;5135	5136	5030
4231A-C	5147	5147	5148	
4236C-U	5097	5097	5098	
4237-0-1 to U-21	5107	5107	5108	
4257	2068	2068	2070	
4266	6513	6513		6513
4267A	3055	3057	3058;3061	





<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
4267B-C	3061	3061	3061	
4268A-T		3119	3120	
4269	157;487; 225	157;225; 306;486	159;226; 306;487	
4270	4239	4238	4239	
4271	5237	5239	5239	
4272	5239	5240	5240	
4273	5240	5240	5241	
4274-4277	5970	5971	5971	
4278A			5458	
4275	5241	5241	5242	5243
4280	3353	3353;5789	5789	3353
4282	5973	5973	5974	
4283		5975	5976	
4284	2733;5812	2734;5812	5813	2734
4285	2735;5817	2735;5817	5817	2735
4286	3001	3001;5384	5385	3002
4297	767	767	768	
4301A-B	388	387;5942	388;5946	Stricken 390
4309B	5334			
4309D	5338	5338		5338
4328	2636	2642		2642
4330	6483;6836	6836;6483	6487	
4334	6325	6335		
4335	6340	6358		6358
4336-4337	6360	6360		6360
4339-4340	6361	6361		6361



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
4341	2559	2955	2956	
4343	328	328	329	
4344	6592	6592	6592	
4345	6845		6845	
4346	720	720	721	
4347	718;864	864	866	
4348	358	374		
4349	1072	1073	1073	
4350-4351	693;698	695	697	
4352-4353	703	701	702	
4354	714			
4355	1393	2650	2651	
4357A-B	2691	2692	2693	
4359-1	1387	1392	1393	
4362	1510	1510		1512
4363	1078	1079	1079	
4364	3258	3259		3260
4365	1163;1585	1166;1590	1166	W/D 1591
4368	1739	1739		1740
4369	1860	1860		
4370	1846	1846	1846	
4371	2004	2006	2008	
4372	2013	2015	2015	
4373	2148	2148		2148
4374	2335			
4375	2522			
4376	2539			



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
4377	2548	2567	2568	
4378	2579	2579		2579
4379	2677	2677		2677
4380	2957	2957	2957	
4381				
4382	3172	3172	3172	
4383	3210			
4384-4385	3223	3226	3226	
4386	3223; 3233	3233	3233	
4387A-B	3223; 3234	3234	3235	
4388	3223; 3242	3238; 3242; 3247	3248	
4389A-C	3223	3238	3239	
4390	3223	3238	3238	
4391	3223	3238; 6509		6511
4392	3223; 3253	3253	3254	
5014	3302	3302		3302
5015-5016	3368	3370; 3582		3372; 3582
5017	3407	3407	3408; 5710	
5018	3581	3581	3581	
5019	3602	3603		3603
5020	3603	3603; 3860	3860	3603
5021	3616	3616; 3738		3617; 3739
5022A-B	3641	3679	3679	
5023	3821	3821	3821	
5024	3895			
5025-5026	3975			





<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
5027	4058	4059	4060	
5028	4118	4119		4119
5029	4404	4404;5189		5190
5030	5247			
5031	4362	4362		4363
5032-5033; 5035;5044	6064	5258;6064		6064
5045	4383	4383;5268		4383;526
5046	4383;5266	4383;5266		4383;526
5047	5286	5281	5283	
5048	5287	5287	5288	
5049	5289	5289	5289	
5050	5452;5453	5453		5453
5051	5454	5454	5455	
5053B-C	5456	5456	5457	
5055	4247	4247	4247	
5056	4387;4409; 5280	5280		4390;528
5057	4409;4387			4390
5059	4811	4811		4811
5060	4553	4553		4554
5061	4783	4785		4785
5063	4480	4480	4481	
5064	4815	4817		4818
5065	4824	4824		4824
5066	4773	4777		4778
5068	4809	4809;6495		4810;6496
5069A-B	4804	4804	4825	



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
5070A-C		4812-4813		4812-4813
5070E-F	4800	4801		4801
5073A-C	4891	4891	4892	
5074	5060	5060		W/D 5060
5077C-D	5053	5054		5055
5078	5120	5126	5127	
5081C-D	5040	5040	5041	
5084	5082	5082	5084	
5085A-D	5107	5107	5108	
5085	5068	5071		5076
5086				
5087	5118	5121		
5088				
5090	5350	5357		5357
5090-5100	5363			
5102	5494			
5103	5495	5495		5495
5104	5497			
5105	5500	5502	5504	
5107	5709	5709	5710	
5108	5916	5916	5916	
5109	5924	5925		5925
5110	5925			
5111	6056			6057
5112-5113	6084	6085		6086
5114	6305	6416	6416	
5114A	6405	6416	6416	



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
5115;5115A	6408	6438	6439	
5116	6413	6437	6438	
5117	6600	6600		6601
5118	6599	6600		6601
5120	6521	6521		6521
5121	6522	6524	6524	





APPELLEES' EXHIBITS

<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
DGE 8345F;G	3279;3280	3280	3280	
DGE 8350A-E	6034	6036	6036	
9000	2956			
9001	2360;2487	2361;2487	2487	
9002-9003	2928			
9006	2931	2933		2934
BW 9024	2161	2164	2164	
BW 9025	2869;6038	2870	2870	
BW 9026	2870	2871	2871	
BW 9027	2874	2875	2876	
BW 9028				
BW 9029	5527	5530		5532
11007	4823	4824	4825	
11008	6166	6167	6167	
WP 12154	5168	5169	5170	
WP 12155	5171	5172	5172	
13015-13112; 13114;13120- 13121;13124- 13127;13133- 13134;13138- 13140	3400	3400	3403	
13034	3393	3394	3394	
13035	3394	3395	3395	
13036	3395			
13037	3396	3396	3396	
13038	3397	3397	3397	
13039	3384	3384	3385	



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
13040	3385	3385	3385	
13041	3387	3387	3387	
13039-13041; 13043-13047; 13049-13054A; 13060;13069- 13070;13075- 13077;13090; 13091;13093- 13097	3399	3399	3403	
13074	3398	3399	3399	
13092	3391	3391	3391	
13098	3394	3394	3394	
13099;13100	3395	3396	3396	
13101-13104	3387	3388	3390	
13135;13136	3392	3392	3393	
13143	3373	3374	3374	
14003	4074	4074	4074	
14004S	1317	1318	1319	



## APPENDIX D

Sections 1 and 2 of the Sherman Act provide, in relevant part (Sherman Act, enacted July 2, 1890, chapter 647; 26 Stat. 209 (15 U.S.C. §§ 1,2)):

"Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared illegal . . . "

"Section 2: Every person who shall monopolize or attempt to monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

Section 4 of the Clayton Act, enacted October 14, 1914, Chapter 323, § 4, 38 Stat. 731 (15 U.S.C. § 15), states:

"That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefore in the District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 4b of the Clayton Act, added July 7, 1955, Chapter 283, § 1, 69 Stat. 283 (15 U.S.C. § 15b), states:

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."





AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA )  
 ) ss.  
CITY and COUNTY OF SAN FRANCISCO )

Edwin C. Shiver, being first duly sworn, deposes and says:

I am a citizen of the United States, and a resident of the County of Alameda, State of California. I am over the age of eighteen years, and am not a party to the within-entitled action. My business address is 2700 Russ Building, San Francisco, California 94104.

On October \_\_\_\_, 1967, I served the within Opening Brief of Appellant, and Appendix A thereto, by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail, at San Francisco, California, addressed as follows:

Bacigalupi, Elkus, Salinger  
& Rosenberg  
300 Montgomery Street  
San Francisco, California

Newlin, Tackabury &  
Johnson  
727 West Seventh Street  
Los Angeles, California

Cooley, Crowley, Gaither,  
Godward, Castro &  
Huddleston  
333 Montgomery Street  
San Francisco, California

Rogers, Clark & Jordan  
111 Sutter Street  
San Francisco, California

Cushing, Cullinan, Hancock  
& Rotherth  
100 Bush Street  
San Francisco, California

Pillsbury, Madison & Sutro  
225 Bush Street  
San Francisco, California

McCutchen, Doyle, Brown,  
Trautman & Enersen  
601 California Street  
San Francisco, California

DATED: October \_\_\_\_, 1967.

\_\_\_\_\_  
Edwin C. Shiver

Subscribed and sworn to before me  
this \_\_\_\_ day of October, 1967.

